SAUGEEN OJIBWAY NATION

CLAIMS UPDATE
NEWSLETTER
MNOOKMI 2011

MESSAGE FROM THE CHIEFS

Chief Ralph Akiwenzie wrote the following message on February 20, 2011, less than two weeks before he passed away. It is one of his last messages to the Nawash community:

This newsletter is intended to update both Chippewas of Nawash Unceded First Nation and Saugeen First Nation communities about the ongoing efforts of our legal advisors, Olthuis Kleer Townshend LLP, and our researchers to advance the major land claim and the Aboriginal Title claim. They are to be commended for their dedication and commitment to the cause. I wish to also acknowledge the important role that the Elders of both communities have played in the research and testimonies given. Kitchi miigwetch to past Chiefs and Councillors who have demonstrated leadership toward reaching our common goals.

I firmly believe that justice will prevail in the very near future whereby the future generations will be the ultimate benefactors once these claims are resolved. In the meantime, I feel that the education process must be accelerated with the younger generation (our youth) in that these claims be included in their school curriculum at all levels. Finally, to our community membership, I say: let's keep the momentum going as our identity and future are at stake! Therefore, your continual support is vital to our eventual success in the courts.

Kitchi Miigwetch,

Chief Ralph Akiwenzie
Ogimaa, Chippewas of Nawash
Unceded First Nation

There is very little I can add to the impassioned words of my dear friend, Chief Ralph Akiwenzie. His message is exemplary of the vision and wisdom he has brought to the many issues facing our Nation. The resolution of our Aboriginal Title claims will only further add to a tremendous legacy that he left for us all.

I would like to acknowledge the efforts of our Elders who have been so fundamental in building the strong evidentiary "back bone" for these claims. I would also like to acknowledge the long standing efforts of our current and past leaders who have fought so hard for the recognition and protection of our rights, interests and way of life. Your dedication is an inspiration to us all and a reminder of the strong resolve of our people. To our legal team, I would say Kitchi miigwetch for your dedication to our people, communities and our Nation and your commitment to justice for our ancestors and our future generations. Finally, to our people: you are the foundation and strength to our Nation. Without your past and continual support, we would simply not be where we are today. The journey we have embarked on is "our" journey. Through unity comes strength. I am confident that together we will succeed in our quest for justice for the Crown's legacy of broken promises and the reaffirmation of our Title to the lakebed that has been vested with our people and our Nation since time immemorial.

I hope that this newsletter offers the opportunity for our young people to better understand and appreciate our history, treaties and our rightful place within our homeland. Our treaties are solemn agreements between our Nation and the Crown. They are not relics of the past, but rather living legal documents. The treaties are a testament to the courage and dedication of our ancestors to protect our relationship to the land (including the water) so that it would continue to sustain us physically, culturally, and spiritually for generations to come. We must continue to stand strong in our understanding of the treaties and ensure that the hard work of so many of our people has not been in vain. It is imperative, to echo the sentiments of Chief Ralph Akiwenzie, that we stay the course. We will not falter. We will succeed.

Kitchi Miigwetch,

Chief Randall Kahgee
Saugeen First Nation

INSIDE THE UPDATE

HOW WE GOT HERE

The Saugeen Ojibway Nation's (SON) territory was approximately 2 million acres when the Europeans arrived in the area. The British initially dealt with the Ojibway Nation on a nation-to-nation basis. They formed military alliances to advance British interests in the region. As they gained military power, the British policy began to change. The Crown sought what they considered to be land surrenders by negotiating treaties with First Nations throughout the late 18th and into the 19th centuries. This left many bands without enough lands to support themselves.

Polly Keeshig-Tobias, *The Illustrated History of the Chippewas of Nawash* (Chippewas of Nawash, 1996)

TREATIES AND SURRENDERS OF LAND

Treaties are agreements between First Nations and the Crown. While the Crown used treaties to gain access to land for settlement and mining, First Nations understood treaties as building nation-to-nation relationships and protecting their relationship to the land. The Crown often promised to protect First Nations' rights and to set aside tracts of land for the exclusive occupation and use of the First Nations and its members.

First Nations had a different understanding of what treaties with the British meant. They thought the treaties were a means of building a nation-to nation relationship and protecting the relationship that First Nations had with their land.

The SON and the British concluded a treaty in 1836 that dealt with the SON's traditional territory. In exchange for opening up a portion of their land for settlement, the British promised the SON that the Saugeen Peninsula would be protected forever for their use. But, not too long after, the government claimed that they could no longer protect the Saugeen Peninsula from settlers unless that land was subject to another treaty with the Crown. This resulted in Treaty 72 in 1854, where the SON allowed much of the land on the Peninsula to be opened up to settlement, believing that there was no other way for the Crown to protect the bands' interests.

THE CLAIMS

In 1994, the SON brought an action in court claiming that Treaty 72 was unfair based on the Crown's behaviour and broken promises.
In 2003, the SON brought another claim seeking a declaration of Aboriginal title to portions of Lake Huron and Georgian Bay waterbeds. Although a number of treaties read as surrenders of land throughout the SON's traditional territory, there are no treaties that relate to the ownership of the lakes and waterbeds.

THE TREATY 72 CLAIM

In 1854, the SON signed Treaty 72 with the Crown. The treaty dealt with land on the Saugeen Peninsula. The SON is challenging Treaty 72 based on the following:

The Crown <u>accepted</u> a duty to protect the Saugeen Peninsula for the SON

- In Treaty 45 ½, 1836, the Crown assured the SON that if the First Nations allowed land in the southern part of its traditional territory to be opened for settlement, the Crown would protect the Peninsula for them forever.
- Where else do we find the Crown's duty to protect the land?
  - Royal Proclamation of 1763
  - Treaty at Niagara, 1764
  - Queen Victoria's Declaration of June 29, 1847 confirming the rights of the SON to the Peninsula
  - Proclamation of November 1851, declaring that provisions of the *Indian Lands Protection Act* applied to the Peninsula

The Crown <u>breached</u> its duty to protect the Saugeen Peninsula for the SON

- In negotiating Treaty 72, 1854, the Crown stated it was unable to protect the Saugeen Peninsula from European settlers.
- The Crown said that if the SON allowed settlement on most of the Peninsula, the Crown would set side reserves for the exclusive use of the First Nations and their members.
- The SON would get the proceeds of the sale of the land.
- <u>The day after</u> Treaty 72 was signed, the Crown did take steps to prevent settlers' trespass that would impact land sales, even though the Crown had claimed it could not protect the land for the SON.

WHAT DOES "EQUITABLE" MEAN?

It's important to understand the difference between EQUITABLE validity and COMMON LAW validity. The distinction stems from the way the British legal system developed historically.

Challenging the treaty's common law validity would mean asking a court to find that everything that happened to the land since 1854 is illegal and must be reversed.

Instead, the SON is challenging whether Treaty 72 is equitably valid, which means asking the questions:

- Given all the circumstances, was Treaty 72 fair to the SON?
- If it was not fair, what remedy can the SON be awarded without creating injustice to people who may have bought the land, but did not participate or even know about the Crown's breaches of duty?

THE TREATY 72 CLAIM IS ABOUT

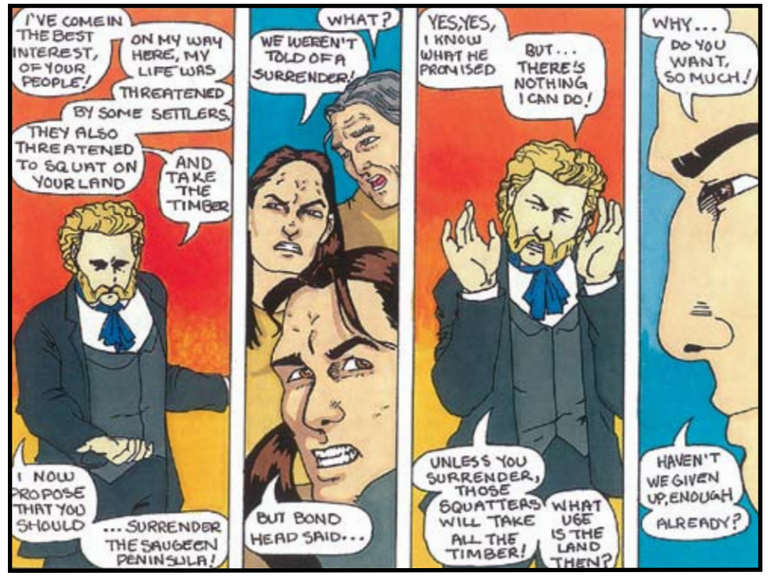
- ❖ THE "EQUITABLE VALIDITY" OF TREATY 72 OF 1854: Given the circumstances and the relationship between the SON and the Crown, was the treaty fair? If it wasn't fair, then Treaty 72 is not equitably valid. To the legal extent possible, the court must wind back its provisions and provide a remedy to the SON. This is different than asking whether Treaty 72 is valid according to rules of common law, which would be about undoing everything that has happened since 1854.
- ❖ RETURN OF LAND IN GOVERNMENT HANDS: Return of lands that have NOT been purchased by people who did not participate or know about the Crown's breaches of duty, i.e. government lands such as national parks, road allowances, and shore road allowances.
- ❖ COMPENSATION FOR NON-RETURNABLE LAND
- ❖ COMPENSATION FOR LOSS OF USE OF THE LAND

THE TREATY 72 CLAIM IS <u>NOT</u> ABOUT

- ❖ RETURN OF LAND IN PRIVATE HANDS
- ❖ COMPENSATION FOR LOSS OF USE OF THE FISHERY
- ❖ IMPLEMENTATION OF THE TREATY:

The claim is not about whether the treaty was properly implemented, i.e. did the SON get full value for lands, or what happened to the money from the land sales. This would be a separate claim.

- ❖ THE VALIDITY OR INVALIDITY OF TREATY 45 ½



Polly Keeshig-Tobias, *The Illustrated History of the Chippewas of Nawash* (Chippewas of Nawash, 1996)

- The Crown did not properly advise SON about their rights to the land.

If, based on the above, a court finds that Treaty 72 was unfair to the SON, then the SON is entitled to some kind of remedy.

What if the 1854 Treaty did not happen?

- The SON would have still owned some or all of the land in the Bruce Peninsula
- The SON would have used some or all of the land from 1854 to present for personal use, or for profit

To the extent possible, if the claim is successful, the court must consider this question and try to wind back Treaty 72 as much as legally possible. This is done through ***COMPENSATION*** and where it is appropriate, the ***RETURN OF LAND*** to the SON.

RETURN OF LAND:

If the land is still owned by the Crown, a court may order its return.

About 10% of the Saugeen Peninsula is in government hands, including:

- National park lands
- All lakes and rivers
- Any original road allowances and shore allowances, which municipalities obtained without paying for them.

If the land is privately owned, the court will not order its return.

About 90% of the Saugeen Peninsula has been sold to people who bought it in good faith and are not to blame for the Crown's broken promises. However, a court may order the government to compensate the SON by paying what the land is now worth plus compensation for loss of use of the land for 150 years.

COMPENSATION:

Based on the advice of experts, the amount of compensation claimed by the SON is $80 billion.

If successful, the communities will need to decide what to do with money awarded as compensation. This will likely be with a view to benefit the community as a whole and its members, now and in the future.

ROAD ALLOWANCES are strips of land reserved for use as roads when a surveyor first surveyed the land. Sometimes roads end up being built on them, and sometimes the land is unsuitable for road building, so roads end up being built on land elsewhere. SHORE ROAD ALLOWANCES are road allowances located at the edge of a river or lake.

THE ABORIGINAL TITLE CLAIM

The SON is claiming Aboriginal title to portions of Lake Huron and Georgian Bay waterbeds, except for those islands that were the subject of treaties. The claim also excludes privately owned lands.

The claim is based on:

- The SON ancestors' exclusive occupation of the area before the assertion of British sovereignty in the 1760s;
- The SON's land rights in the territory have NOT been surrendered; and
- Treaties between the Crown and the SON do NOT include or mention lakes or waterbeds in the territory claimed, so the SON still owns that land.

The SON is seeking a declaration of Aboriginal Title to the lands claimed. If the SON is successful, then it will mean the SON has the right to determine who uses those lands.

WHAT IS ABORIGINAL TITLE?

In Canadian law, it is a land right that means:

- The land is held communally by the First Nation
- The First Nation can use the land exclusively in a way that is compatible with the First Nation's attachment to the land
- The land cannot be transferred to anyone but the Crown

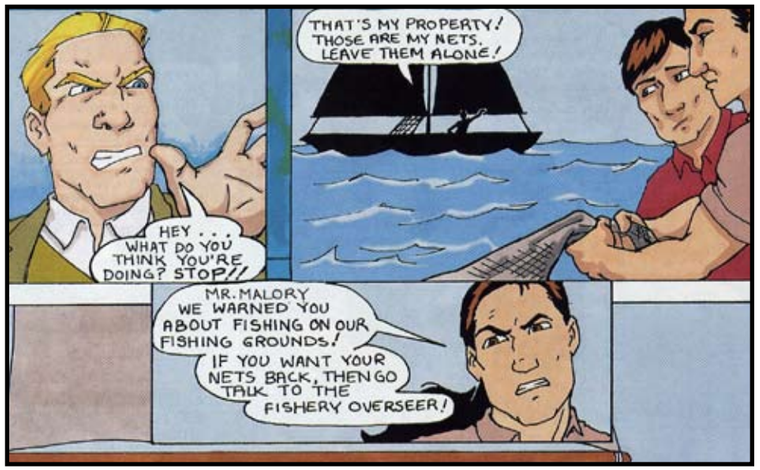
How do you prove Aboriginal Title in Canadian law? A First Nation may have Aboriginal Title to land where that First Nation or its ancestors **exclusively occupied** the land at the time the British asserted sovereignty. Proof can include **physical occupation in the past and in the present,** the First Nation's exercise of its **laws and customs** in the territory and **oral history.**

THE ABORIGINAL TITLE CLAIM IS ABOUT

- ABORIGINAL TITLE TO THE LAKES AND WATER BEDS IN THE SAUGEEN OJIBWAY NATION'S TERRITORY
- ACCOUNTING OF GOVERNMENT REVENUES FROM THE LAND
- THE OWNER OF THE WATERBED GETS CONTROL OF SURFACE AND EXCLUSIVE FISHING RIGHTS

THE ABORIGINAL TITLE CLAIM IS NOT ABOUT

- RETURN OF LAND IN PRIVATE HANDS



Polly Keeshig-Tobias, *The Illustrated History of the Chippewas of Nawash* (Chippewas of Nawash, 1996)

PROTECTING SON RIGHTS & INTERESTS ABORIGINAL CONSULTATION

This will not include privately owned lands. A court will not order people who did not know about the SON's claims and bought the land in good faith, to return the land to the SON

- Instead of seeking the return of privately owned lands, the SON is seeking compensation from the government for the loss of that land
- The SON is also claiming the revenue the government received from use of the land.

WHY CLAIM "WATERBEDS"?

The Aboriginal Title claim is stated as a claim to the waterbed (not the water), since in Canadian law, rights above and below the soil generally are held by the owner of the soil. In this case, it means that the owner of the waterbed has rights to the water, the fish, the air above and the minerals below the soil. Other principles of law can change this, but this is the starting point for the law.

Government and companies must consult with and accommodate Aboriginal people whenever they do something that could affect Aboriginal rights and interests.

This is referred to as the **DUTY TO CONSULT,** and it is legally required by the Constitution of Canada. Briefly, the duty to consult is:

- The requirement that the Crown or a third party must talk with a First Nation to find out about how a proposed project could negatively affect that First Nation's Aboriginal and treaty rights (including rights to lands and resources);
- The requirement that the Crown or a third party may need to change the proposed project if necessary, in order to reduce negative impacts on Aboriginal and treaty rights; and
- An important step in reconciling the relationship between the Crown and First Nations, according to Canada's courts.

Consultation must take place whenever the Crown knows, or ought to know, that a project or decision could negatively impact Aboriginal or treaty rights. That means government and companies must **CONSULT** with the SON about activities that fall within, and may negatively impact, the lands claimed in both the Aboriginal Title and the Treaty 72 Claim.

The **DUTY TO CONSULT** requires that the Crown act honourably and ensure that the rights asserted by the SON in its claims are not compromised before the claims are decided by a court. The types of activities that could trigger this consultation duty include resource development, or selling properties located in the SON's traditional territory.

The SON has had many more opportunities for consultation about projects as a result of the land claims. Many projects, such as shoreline alterations, energy projects, quarry projects and new municipal sewer and water systems have the potential to affect the SON's land claims because they are happening in or near the lands claimed. The goal of the consultation process is to ensure that the SON's long term interests (including protecting the lands being claimed) are respected.

THE LEGAL PROCESS

The Treaty 72 Claim started in court in 1994; the Aboriginal Title Claim began in 2003, and the two claims were merged. The SON is currently litigating the issue of the Crown's liability in both claims. If successful, then the SON will litigate the matter of compensation that is due, or - at that point - the government may be willing to negotiate compensation instead.

THE PARTIES TO THE CLAIM

PLAINTIFFS - The Saugeen Ojibway Nation, Saugeen First Nation and the Chippewas of Nawash Unceded First Nation

DEFENDANTS - Canada, Ontario & Municipalities

PLEADINGS
THE PARTIES SET OUT THEIR POSITIONS ON MATTERS AT ISSUE

→ **COMPLETE**

DISCOVERY OF DOCUMENTS
EXCHANGE OF RELEVANT DOCUMENTS BETWEEN PARTIES, SO THERE ARE NO SURPRISES AT TRIAL

The SON has about 13,000 documents that have been reviewed, scanned and key-worded. As the process continues, new documents may come up and will need to be disclosed

→ **COMPLETE**

EXAMINATIONS FOR DISCOVERY
EACH PARTY IS ENTITLED TO ASK QUESTIONS OF OTHER PARTIES ABOUT ANYTHING RELATED TO THE CASE AND EVIDENCE SHARED

Because the claims are historical and document driven, all parties agreed to do discovery in writing, versus questioning witnesses

→ **IN PROGRESS**

STEP 1
All parties draft and exchange questions - for example:

- What were the intentions of the parties leading up to the negotiations of Treaty 72?
- How was control exercised by the SON in the region?

→ **COMPLETE**

STEP 2
All parties answer the questions

All questions have been asked, and the answers are in the SON's documents, but experts may be consulted to fill in some gaps to make sure nothing is missed

→ **IN PROGRESS**

STEP 3
Parties may make motions in court about whether the answers are proper and sufficient

TRIAL
THE PARTIES SET OUT THEIR CASES THROUGH EVIDENCE AND LEGAL ARGUMENT BEFORE A JUDGE, WHO WILL DECIDE THE MATTER