SAUGEEN OJIBWAY NATION

LAND CLAIMS UPDATE

This update is about the land claims that our First Nations, Saugeen First Nation and Chippewas of Nawash First Nation, have brought forward together. Our land claims include two court cases:

> **The Treaty Claim:** this court case was launched in 1994. It is about the promises the Crown made to our ancestors in 1836 to protect our lands on the Saugeen (Bruce) Peninsula. The Crown did not keep that promise, and in 1854, our ancestors signed Treaty 72. This claim is about whether the Crown had a fiduciary obligation to protect our lands, in addition to obligations to act honourably and in a way that fulfilled its treaty promises.
>
> **The Aboriginal Title Claim:** this court case was launched in 2003. It is about our relationship to our water territory. It is a claim for a declaration of Aboriginal title (an Indigenous land ownership right that is recognized and protected by the Canadian Constitution) to portions of Lake Huron and Georgian Bay.

The two cases have already been through several steps in court. There has been a trial and an appeal at the Court of Appeal for Ontario so far.

The next level of appeal is to the Supreme Court of Canada – which is the highest court in Canada. To be able to appeal to that court, we need to convince the Supreme Court of Canada that our claims raise issues of public importance. This is called asking for "leave to appeal." We are now asking for leave to appeal parts of both the Treaty and Aboriginal Title claims to the Supreme Court of Canada.

Below we've included more details about each of the claims, the decisions of the trial court and the Court of Appeal, and an update on where we are now.

THE TREATY CLAIM

What is the Treaty Claim About?

In 1836, senior Crown officials came to the Saugeen Ojibway Nation's (SON) ancestors to ask them to give up their territory to make way for white settlers. The Crown's first ask was that SON's ancestors move to Manitoulin Island. SON's ancestors said no. So, the Crown made another offer: if SON gave up the part of the territory south of Owen Sound, the Crown would protect the Saugeen (Bruce) Peninsula ("the Peninsula") for you "for ever" from the encroachment of the whites. SON reluctantly agreed and concluded a treaty with the Crown – known as Treaty 45 ½.

But the Crown did not protect the Peninsula. It did not act to stop white settlers and timber thieves. And then, when it had failed to keep its promise, Crown officials told SON that SON had no choice but to give up the Peninsula because the white settlers could not be stopped. The result was Treaty 72, where SON surrendered the Peninsula to the Crown in 1854.

In 1994, SON filed a civil action in the Ontario Superior Court. In this action, SON claimed that the Crown had breached its fiduciary duties and the honour of the Crown by failing to protect the Peninsula as it had promised to do in Treaty 45 ½ (the Treaty Claim). A fiduciary duty is a kind of duty recognized by Canadian law which is especially flexible and powerful.

WHAT IS SON ASKING FOR?

In the Treaty Claim, SON sought **compensation** and also a **constructive trust** over lands that are still owned by Ontario and Canada (like the Bruce Peninsula "National Park"), and other lands that were not sold to third parties. SON also sought a constructive trust over the road allowances and shore road allowances that the Crown gave to the local municipalities for free. A **constructive trust** means that even though legal title to those lands is with the Crown, the beneficial (real) owner is SON because the Crown got those lands in breach of its duties to SON. For all the land that was sold to private individuals and cannot be returned to SON, SON has asked for **compensation**, meaning money for those lands.

PHASES OF THE TREATY CLAIM: LIABILITY AND REMEDIES

The Treaty Claim was split into two phases. Phase 1 is about what duties the Crown has to SON and whether it breached those duties. Phase 2 will be about remedies – so, whether SON should get compensation and lands back. Right now, the Treaty Claim is still in Phase 1. Phase 2 will take place only after all appeals about Phase 1 are completed.

The Court Process

THE TRIAL

The Treaty Claim went to trial in 2019. The trial lasted 102 days, and the decision was released in 2021.

The trial judge agreed with SON that the Crown's failure to do what it could have to protect the Peninsula was a breach of the treaty and a breach of the Crown's honour. However, the trial judge did not agree that the Crown had a fiduciary duty to protect the Peninsula and dismissed that part of the claim.

THE COURT OF APPEAL FOR ONTARIO

SON appealed the trial judge's conclusions on the fiduciary duty issue to the Court of Appeal for Ontario. SON argued that the trial judge made mistakes in interpreting and applying the law about fiduciary duties.

The Court of Appeal disagreed with SON. They said that Canada and Ontario did not have a fiduciary duty to protect SON's land. However, they confirmed the trial judge's decision that the Crown breached its honour and the treaty promise.

WHAT ABOUT THE MUNICIPALITIES?

As part of the Treaty Claim, SON also sued six municipalities: Grey County, Bruce County, Saugeen Shores, Georgian Bluffs, Northern Bruce Peninsula and South Bruce Peninsula.

SON has never argued that the municipalities did anything wrong in the treaty councils, or breached any treaty promises to SON. The Treaty Claim is and always has been about breaches by the Crown (Ontario and Canada). The reason why the municipalities were involved in this case is because they own road allowances. Road allowances include the lands being used as roads and a lot of lands that were intended to be used as roads but where roads were never actually built. The municipalities got the road allowances on the Peninsula from the Crown without paying for them, so part of SON's claim was that as a remedy, the road allowances should also be subject to a

constructive trust (a declaration that SON has a beneficial interest in the road allowances). No compensation was being claimed from the municipalities; compensation is only being claimed from Ontario and Canada.

At trial, the municipalities argued that since there were no allegations that they did anything wrong and because they are required to pay to maintain roads, they should be left out of the Treaty Claim. The trial judge decided that these arguments should be dealt with in Phase 2.

The municipalities appealed this, arguing these issues should be dealt with now and they should be let out of the Treaty Claim. The Court of Appeal agreed with them and dismissed the claim against the municipalities. That means that SON's claim to the road allowances and shore road allowances is no longer proceeding. However, this does not affect SON's claim to compensation for the value of those lands, which is a claim against Ontario and Canada. And it does not affect SON's claims to a constructive trust over lands on the Peninsula held by Ontario and Canada, like parks.

Before the appeal, SON had settled with three of the municipalities: Grey County, Bruce County and Saugeen Shores. The settlements involved the transfer of lands to SON. Those settlements were the product of cooperation and good faith efforts to reach a positive resolution, and they are not affected by the decision of the Court of Appeal.

APPEALING TO THE SUPREME COURT OF CANADA

SON has applied to the Supreme Court of Canada to ask for leave to appeal the decision of the Court of Appeal against Ontario and Canada only. The appeal will ask the Supreme Court of Canada to weigh in on the question of whether the Crown had fiduciary duties to SON to protect the Peninsula as it had promised to do.

Like the trial judge, the Court of Appeal found the Crown breached its honour and the treaty by failing to protect the Peninsula. In this way, our case has been successful. However, we are bringing an appeal on the issue of whether the Crown had and breached its fiduciary duties to us because it may increase our chances of getting stronger remedies, such as land back, in Phase 2.

We have filed our arguments about why the Supreme Court of Canada should hear our appeal. We will find out if the Supreme Court of Canada will hear the appeal in a few months.

THE ABORIGINAL TITLE CLAIM

SON's Aboriginal title case is a claim in court for a declaration of Aboriginal title to portions of Lake Huron and Georgian Bay.

What is Aboriginal title?

Aboriginal title is an Indigenous land ownership right that is recognized in Canadian law and protected by the Canadian Constitution. Under Canadian law, the test for Aboriginal title is:

a. That the Indigenous group was present in and occupying their territory at the time that the British asserted sovereignty (in our case, 1763).

b. That the Indigenous group used the territory.

c. That the Indigenous group could control that territory and exclude others.

THE TRIAL DECISION

On July 29, 2021, the trial judge decided that SON did not meet the test set out by Canadian law for Aboriginal title.

The trial judge agreed that there was a lot of evidence of SON's historic presence on the Peninsula and in some of the waters around the Peninsula for fishing and ceremonial practices going back to 1763 and earlier. But, in her view there was not enough evidence of SON using and occupying the whole claimed area nor was there enough evidence to show that SON had the ability to exclude others from the claimed area in 1763.

The trial judge declined to consider whether SON established Aboriginal title to a smaller area within the bigger claim area.

The trial judge also thought that Aboriginal title in a water space like Lake Huron and Georgian Bay was inconsistent with the public right of navigation – meaning the public's right to use the water for travel or transport. This is a right that is generally protected in Canadian law. She used this as a basis to say that Aboriginal title could not exist in the claimed area.

THE ONTARIO COURT OF APPEAL DECISION

SON appealed the trial judge's decision to the Court of Appeal of Ontario. At the Court of Appeal, SON argued:

1. The trial judge did not interpret the test for Aboriginal title from SON's perspective, which Canadian law requires. For example, she didn't consider that SON's evidence about its relationship and responsibilities to the water could go to establishing its use and occupancy of the claim area.

2. The trial judge used the wrong test for Aboriginal title by focusing on the Canadian legal test for Aboriginal rights rather than the established test for Aboriginal title.

3. The trial judge set the standard for proving title too high by requiring that SON show that it could fend off a hypothetical attack from the British army.

4. The trial judge was wrong to find that the Treaty of Niagara was not a treaty. She did not correctly apply the Canadian legal test for establishing whether a treaty was made.

5. The trial judge was wrong to decide that Aboriginal title could not exist in areas where there is a public right of navigation.

6. The trial judge should have considered whether SON could prove they held Aboriginal title to a smaller Aboriginal title claim area.

The Court of Appeal rejected most of SON's arguments, but granted SON's title appeal on the last point – that the trial judge should have considered whether SON could establish title to a smaller area. They sent the case back to the same trial judge to determine this question.

The Court did not answer the question of whether Aboriginal title and the public right of navigation can co-exist. Instead, they said they would need to know exactly where SON can prove Aboriginal title in Lake Huron and Georgian Bay before deciding whether that Aboriginal title is compatible with the right of public navigation.

The Court of Appeal directed that the trial judge to come up with a procedure that is fair to both sides, and that will allow her to determine whether Aboriginal title can be established to a more limited part of SON's broader Aboriginal title claim area. If the claim to a smaller area is proved by SON, then the trial judge can consider whether the Aboriginal title area conflicts with the public right of navigation.

WHAT HAPPENS NEXT?

SON has filed an application for leave to appeal parts of the decision. The key issues SON is raising are 1) whether it is legally possible for Canadian law to recognize Aboriginal title to water spaces where there is a right of public navigation; 2) whether a First Nation needs to show that it was able to exclude European colonizers from their territory, or only that it could exclude other Indigenous peoples; and 3) does control over the resources in a territory, such as fishing, amount to control of the territory.

Ontario filed its own request for leave to the Supreme Court of Canada, also asking the Supreme Court to decide the issue of whether it is legally possible for Canadian law to recognize Aboriginal title to water spaces where there is a right of public navigation. Ontario also is saying that the Court of Appeal should not have returned SON's claim for a smaller Aboriginal title area to the trial judge because it did not find any other errors in her decision.

Ontario's application for leave to appeal is complete and ready to go to the Court for a decision. SON's application will be completed in February 2024. The Court will likely consider the two applications together in a few months.