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BACKGROUND TO THE NAWASH SAUGEEN BREACH OF TRUST SUIT

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> How I loathe the term "Indian". . . "Indian is a term used to sell things -- souvenirs, cigars, cigarettes, gasoline, cars. . . . "Indian is a figment of the white man's imagination.
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> - Lenore Keeshig-Tobias, Nawash-Saugeen Ojibway, 1990
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> . . . will not be molested or disturbed upon any pretence whatever upon any lands whatever that had not been purchased from them by the Crown. . .
>
> Royal Proclamation 1763

The home of the Nawash and Saugeen Ojibway First Nations is on the Bruce Peninsula in the Province of Ontario in central Canada. The area is located some 250 miles North East of Detroit and has been a tourist destination for people from the central United States and southern Ontario for many years. It is an area of spectacular beauty with high limestone cliffs on its East side, this is the northernmost part of the Niagara escarpment, and wide sandy beaches on the West. With a shoreline over 500 miles long it is the breeding ground for over 170 species of birds and more than 40 species of wild orchids. Its woods and inland waters are home to grouse, rabbits, ducks and Canada geese along with white tail deer and black bears. The surrounding waters still have large populations of steelhead, hybrid lake trout, chinook salmon, pike, bass and perch.

All this belonged to the Nawash and Saugeen people until the treaty of 1854. Since that time they have been confined to two small reserves on each side of the peninsula and in recent years many rights, included in that treaty, have been infringed.

During the early colonial period the British Crown had no particular policy towards the native peoples. The attitude was one of pragmatism. Do what you had to do to accommodate these people in such a way that their military allegiance was assured and the supply of resources to the mother country was maintained. In many cases the aboriginal people were stronger militarily than the few British

regulars and the poorly trained local militia. What is certain is that during the period 1815-50, both the government and the settlers viewed the native people with suspicion. This was the era of the Zulu War (1838) and the Indian Mutiny (1857). It was also during this period that the colonists began to construct railways and canals to move the resources, particularly Ontario wheat, to market.

The net effect of all this was to provide great mobility for incoming settlers and settlers needed land. To maintain some semblance of legality treaties were signed and Native People confined to reserves where they became isolated for large parts of the year. Having lost their economic base their culture began to deteriorate and this coupled with disease almost destroyed them.

The instrument to achieve this was the Indian Act of 1876, passed nine years after Canada's Confederation. This Act fragmented the native population into legally distinct group separating men, women and children and restricting them to different rights and obligations. Over the years the Act was fine tuned to give the government greater control over native education, morality and land but in all cases the main objective was the destruction of native culture and the assimilation of native people into Canadian society although as an underclass. No native could vote unless he severed all ties with the native community. During the nineteen twenties some First Nations, notably the Mohawks of the Six Nations, attempted to organize politically and take their case to the League of Nations. Canada prevailed on Britain to have the case dismissed from the League's agenda and passed legislation banning native political organizations and prohibiting natives from seeking redress through Canadian Courts. This prohibition was finally repealed in 1951 and Canadian First Nations recognized as Canadian citizens and allowed to vote in 1960.

These events occurred during a period of rapidly expanding technology. That affected almost every aspect of human life from transportation to weapons. In the process Canada's aboriginal people lost over one hundred years of advancement, perhaps by chance but more likely by design. Those years transformed the settlers from dependence on aboriginal people to the strength to overwhelm them. Now some of these peoples are seeking a new and innovative way to regain some of the material and cultural assets that have been lost since 1854. They have begun to regain their cultural identity and to relearn their language. This is about one First Nation that has chosen to use the law in an attempt to regain a small part of its cultural and economic inheritance.

In what is perhaps the most unusual land claim in Canada to date two Ontario First Nations are seeking 55,000 acres and $90 billion in compensation. On May 27th 1994 the Saugeen and Nawash Ojibway filed a statement of claim against Ontario and Canada for a breach of their fiduciary

obligations (trusteeship) to the First Nations in the negotiation and signing of the Treaty of 1854. The Saugeen and Nawash Ojibway are also asserting ownership of road allowances currently vested in nine municipal defendants in Gray and Bruce Counties. The part of the claim that is likely to have the most far reaching affect is the return of unsold road allowance, particularly "shore road allowance."

For readers unfamiliar with this term, this is briefly what it means. It was the practise of the original surveyors in the Province of Ontario to leave a 66ft. strip of land around all coastlines of major lakes. This strip is known as a "shore road allowance." Over the years as roads were built they tended to follow the easiest terrain rather than the shore, consequently the owners of the land inside the allowance began to view the 66ft. strip as their property although they held no patent to it. Over the last fifty years many people have built expensive homes on the shore road allowance. Recently some municipalities, who received the rights to the shore road allowance from the province have begun to sell the land for $1.00 plus legal fees or in some cases trade the shore for another 66ft. strip.

In October 1993 The Ontario Federation of Anglers and Hunters acting on behalf of The Keppel Township "Shore Line Owners Association" tried to prevent a court from hearing the Nawash and Saugeen claim to this allowance. The lawyer for the Township and OFAH, Don Greenfield suggested that if the First Nation is successful at trial they will bar all access to the water. Chief Ralph Akiwenzie of the Nawash Nation said "this was a flagrant attempt to inflame public opinion against the First Nation. The idea of the Saugeen Ojibway barring access to the water to anyone, including sport fishermen is ludicrous." Greenfield was unsuccessful and Justice Robert Zelinski granted the First Nation the right to litigate their claim.

In August 1994 I traveled to Cape Croker on the Bruce Peninsula, the home of the Nawash First Nation, to interview Darlene Johnston. Professor Johnston, an Ojibway, is on leave of absence from the Faculty of Law at the University of Ottawa and is the Land Claims Coordinator for the Nawash and Saugeen Ojibway.

Ms. Johnston says "that the Royal Proclamation of 1763 guaranteed First Nations territories and that the surrender of land could only take place at meetings specifically called for that purpose and then only if the Natives wanted to dispose of the land. The meeting on Manitoulin at which the Saugeen and Nawash Ojibway signed the 1836 Treaty was not called for the purpose of land surrender. During this meeting Sir Francis Bond Head, the Lieutenant Governor of Upper Canada told the meeting that he "could not protect all their lands from the encroachment of white settlers but if they surrendered the lands to the south the peninsula would be protected." This Treaty, known No. 45 1/2 resulted in the loss of one and a half million acres of the Saugeen

traditional territory just south of what-is now the Bruce Peninsula. In return for surrendering this land, the First Nations received a promise that Canada would protect their fishery as well as their new home, the Bruce Peninsula. However by 1847 the Chiefs and Councils of the Saugeen Ojibway were becoming aware of continuous encroachment and were nervous enough about the intentions of the government in Canada to seek a written confirmation of their lands from Queen Victoria."

In her Royal Declaration of 1847 Queen Victoria confirmed the Saugeen Ojibway lands consisted of the entire Saugeen Peninsula (Bruce Peninsula,) north from a line joining Southampton and Owen Sound. The Saugeen Ojibway territories also included a seven-mile limit out into the waters around the Peninsula. In an 1851 treaty the Saugeen Ojibway surrendered a half-mile wide strip stretching between their two largest settlements at Owen Sound and Southampton in the belief that the government would build a road and improve communications between the two communities. The road was not built until many years later. The Rev. C. Vandusen, a local historian of the times, states that the road was not built because the Indian Department sold the land to speculators.

Ms. Johnston continued saying "by 1854 the Saugeen Ojibway were under pressure to cede the Bruce peninsula. During negotiations the Crown negotiators threatened to assume absolute control of the Saugeen Ojibway and further breached the 1763 proclamation and the 1850 Act to protect Native Rights. By Treaty No. 72, signed in 1854, the Saugeen Ojibway ceded the Saugeen (Bruce) Peninsula (500,000 acres) except for specific reservations. However, in negotiations, the government violated both the Royal Proclamation of 1763 and the Indian Protection Act of 1851. The evidence of the Crown's breach of its obligations to the Saugeen Ojibway is the following. -- The Crown agrees to sell the surrendered land, invest the proceeds (minus surveying and auction costs), and distribute the interest to the Saugeen Ojibway. The 1855 Order in Council, by which the Government accepted the terms of the surrender, states clearly the Crown received the lands "in trust." In other words, the Crown accepts responsibility to sell the lands for the benefit of the Saugeen Ojibway. However, certain lands are left unsold although the government promised to sell all the lands for the benefit of the Saugeen Ojibway. These lands, lake and river beds, shore road allowances other road allowances and certain lots throughout the Peninsula are the basis of the claim."

From 1979 to 1993 the Saugeen Ojibway began a long series of negotiations with the Crown (Canada and Ontario) to resolve issues from the 1836 and 1854 Treaties. These negotiations stalled in 1993. Therefore in May 1994 the two First Nations filed a claim for BREACH OF FIDUCIARY OBLIGATIONS. The claim states that the Crown (ie. both Ontario and Canada) has obligations to First Nations much as

any trustee has toward those on whose behalf it acts. The Saugeen Ojibway charge that in the signing of the 1854 Treaty, the Crown breached its fiduciary obligation to them and that because the Crown negotiators threatened to assume absolute control of the Saugeen Ojibway they significantly misrepresented the benefits of the Treaty for the Saugeen Ojibway. The Crown stated that it was unable or unwilling to protect the Saugeen Ojibway from encroachments by whites. The Crown negotiators made no attempt to advise the Saugeen Ojibway of their rights. They conducted negotiations in a way that effectively excluded those of the Saugeen Ojibway known to oppose the Treaty. The Saugeen Ojibway are not saying the treaty is legally invalid, but they are saying the situation deserves remedy, and that remedy should include the return of the unsold lands as well as compensation for surrendered lands.

Darlene Johnston used the example of listing your farm with a Real Estate agent. You have no reason to suspect this person is not honest because there are laws governing his actions that are designed to protect your interests. But instead of selling it, he lives on it for years. In fact, he never does get around to selling all of it, and the parts he does sell, he sells to relatives for less than market value and you receive none of the proceeds.

According to Darlene Johnston, "That doesn't mean we are going after land already patented, so people in the Bruce and cottage owners needn't fear for the homes and land they bought in good faith. It does mean, however, that if we are successful at trial, we will be asking the court to compensate us for losses resulting from the bad faith of the Crown. Compensation might take a number of forms, the return of unpatented lands, including road allowances, lands currently owned by Canada or Ontario, financial compensation for lands that were sold but cannot be returned to the First Nations because they are owned by private parties and financial compensation for the loss of use of lands in the Bruce Peninsula since 1854. The goal is to return the First Nation to the position we would have been in if the treaty had never been signed. At least as much as is legally possible." The preparation of this case has taken thousands of hours of work by members of the Saugeen Ojibway community. It involved doing a title search on all the land confirmed as belonging to them in Queen Victoria's Royal Declaration lot by lot. From this the extent of the unsold land was established and added to the land known to be held by the government. The claim runs to over 500 pages.

The research work and the preparation of the claim seems to have given the whole community a new sense of purpose as if they had suddenly turned a corner and could now see light after years in a dark tunnel. They have re-instituted healing ceremonies in a new building built for that purpose and people from other First Nations come to reap the benefit from these.

This could possibly turn out to be one the most significant civil suits in Canadian legal history with implications throughout Ontario and other provinces covered by treaty. The fiduciary obligations of the Federal Government to First Nations were established in a 1984 Supreme Court of Canada ruling in favour of the Musqueam Nation of British Columbia. The Musqueam claimed that the Department of Indian Affairs in 1944, had leased part of their reserve, for peppercorn rent, to a white group for the creation of a golf course. The Supreme Court awarded the First Nation $6 million. In this case the claim is for "loss of use" of 500,000 acres for 140 years. The claim is expected to go to trial in the fall of 1995.

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