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What if Ontario residents don't have proper title to their lands?

It happened in Sarnia; could it happen here?

One of the scariest things that can happen to any homeowner is to have a stranger come along and say, "This is my land. Please leave it now."

But that's exactly what happened to more than 2,000 families, businesses, churches, organizations and individuals in the City of Sarnia when an Indian band appeared out of nowhere and claimed - correctly, as it turned out - that the British crown never received good title of the lands from their ancestors in the 19th century.

The Chippewas of Sarnia filed their action in the Ontario courts in 1995, claiming that they never surrendered the land, that the original crown grant was invalid, and that they still held title to the lands. They sought to evict the current owners and recover damages from the federal and provincial governments.

It all began in 1763 after the British defeat of France in the Seven Years' War. Anxious to maintain good relations with their native allies, the British government of King George III issued a royal proclamation setting out its imperial policy on Indian lands. It recognized that the First Nations had rights in their lands. It established imperial control over settlement on Indian lands, and prohibited private purchase of Indian lands. Any sale of Indian rights in their lands had to be by way of surrender to the Crown first, and then sale by the crown to private citizens.

Before European fur traders and settlers came to North America, the Chippewa Nation (also known as the Ojibway, the Saulteux and the Anishnabek) occupied vast tracts of land around Sarnia. By 1827, they had surrendered much of that land to the crown, retaining four reserves in the area. One was the Upper Reserve, comprising 10,280 acres along the St. Clair River.

In November 1839, in violation of the government requirement prohibiting direct dealing with First Nations peoples, Malcolm Cameron, a land speculator and politician, purchased 2,540 acres in the Upper Reserve directly from the Chippewas. This took place despite the lack of a formal surrender of the land to the crown, which was required under the 1763 royal proclamation.

Eventually, in 1853, the crown, through Governor-General Lord Elgin, deeded the land to Cameron by way of a crown grant, known as a "patent." By 1861, Cameron had sold off all of the land. Today, more than 2,000 landowners trace their title directly back to the crown patent to Cameron.

In response to a preliminary court application in 1999, a judge ruled that the 1853 crown patent to Cameron had no effect at all because the Chippewas had never lawfully surrendered the land to the British crown. Instead, they sold it directly to Cameron who had his title later confirmed by the crown.

This, ruled the judge, was improper. Since the crown never received a surrender, Cameron's title was invalid under the royal proclamation of 1763. So, too, were the 2,000 titles of everyone who today occupied the Cameron land.

But the judge ruled there was a 60-year limitation period within which the Chippewas could object to the titles of the lands. That period expired in 1921, 60 years after Cameron sold off the last parcel. As a result, the only remedy the Chippewas had was a damage claim against the crown for selling off Indian land that was never properly surrendered.

When the case got to the Ontario Court of Appeal last year, 20 lawyers appeared on behalf of the many parties to the case, including the 2,000 landowners joined together in a class action.

In December 2000, five justices of the Court of Appeal released their decision. They all agreed there was never a valid surrender of the lands by the Chippewas, but the Chippewas had also never disputed the sale and were fully aware of it.

The court had the authority to rule the Cameron patent invalid, but decided against it, citing the lengthy delay, the apparent acquiescence of the Chippewas in the mid-1800s, and the reliance of thousands of innocent purchasers over the years right up to the present.

`I experienced cold chills when I read the Chippewa court case'

The actions of the Chippewas between 1840 and 1855 indicated a communal awareness of the transaction and acceptance of it, and that was good enough for the Court of Appeal.

Since the 1853 patent was valid, the Chippewas could only proceed to claim damages against Canada and Ontario.

Unfortunately for the landowners, this is not the final word on the subject. Earl Cherniak, lawyer for the Chippewas, told me last week that the parties are headed off to the Supreme Court of Canada. Until its final judgment, the 2,000 Sarnia land titles remain in a legal limbo.

As a Toronto resident, and as a lawyer who has provided title opinions for thousands of Toronto properties over the years, I experienced cold chills when I read the Chippewa court case. Is it possible, I wondered, that there are land titles in Toronto where the land was not properly surrendered and its current ownership might be in doubt - just like the Sarnia properties?

Between 1764 and 1806, the crown negotiated surrenders of Indian lands along the shorelines of lakes Erie and Ontario, but did that include all of the Greater Toronto Area?

Admittedly, the instances of Ontario land where there was no aboriginal surrender of title are probably rare, but I would feel much better knowing that the British government officials who presided over Upper Canada after the French defeat followed the proper protocol.

If the native lands in this area were not properly surrendered to the British crown, we could all be sitting today on land with defective titles.

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