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Tough to reconcile Caledonia land dispute

In the wake of the recent events at the Douglas Creek Estates subdivision near Caledonia, will any Ontario citizen be able to rely on a government certification of title to their homes?

Can Ontario citizens continue to have confidence in our justice system when a court threatens occupiers of land with criminal and civil contempt charges, but the authorities are unable, or unwilling, to restore possession to the title holder?

Will the federal and provincial governments ever be able to reconcile the conflict between aboriginal title claims to land in Ontario, and government-guaranteed deeds of absolute title?

The origins of the Caledonia dispute date to Oct. 25, 1784, when Capt. Frederick Haldimand, governor-in-chief of British North America, issued the Haldimand Proclamation. For their loyalty to Britain during the American Revolution, the Mohawks and other Six Nation Indians were given the right to settle on the banks of the Grand River.

The area covered by the proclamation extended about 10 km on either side of the river, starting at Lake Erie and running right up to the headwaters. In all, the parcel comprised about 385,000 hectares.

Haldimand's term of office ended before the proclamation could be concluded with a grant of legal title to the land.

The fuzzy wording of the Haldimand Proclamation resulted in a set of controversies that are still raging today.

The British Crown interpreted the document to mean that it was merely a non-transferable licence to occupy the land in other words, the land could not be resold.

But on behalf of the Six Nations, their representative Joseph Brant took the position that it gave the Indians absolute title to the land. To prove his point, he started leasing and selling huge portions of the tract to British settlers.

In 1793, governor John Graves Simcoe signed the Simcoe Patent, which gave the Six Nations title to 223,163 hectares of the original tract along the Grand River.

At the same time, it declared that all future land transactions in the Haldimand Tract had to be approved by the Crown, but Brant simply ignored it and continued to invite paying settlers onto the land.

By 1828 nearly two-thirds of the Grand River territory had been sold, leased or settled by squatters. By 1847, the original parcel was reduced to about 20,000 hectares.

On May 15, 1848, the land where the Douglas Creek Estates now sits was sold by the Crown to George Marlot Ryckman for 57 pounds and 10 shillings, and a deed called a Crown grant was issued to him.

In 1992, Henco Industries Ltd. purchased 40 hectares of this land for development as new housing.

Three years later, the Six Nations sued the federal and provincial governments for an accounting of the land and money involved in the Haldimand and Simcoe documents. That case is still ongoing.

Last year, the provincial government approved registration of a 240-home subdivision plan for this property in the local land registry office, and it guaranteed Henco title to the property under the Land Titles Act.

As I understand it, the native position is that the land which includes the Douglas Creek Estates subdivision was deeded to them by Haldimand in 1784, was never sold off by them or their representatives, and still belongs to them. Henco Industries, on the other hand, claims good title dating back to a Crown grant in 1848 and verified today by the Land Titles Act.

The question that naturally follows, of course, is: how many homes and businesses in and around Brantford and Caledonia are still the subject of aboriginal land claims?

It is clear to me as a real estate lawyer that Ontario's 12.5 million citizens need a land registration system that can be relied on as absolute and final. When the government registry office issues a deed to a citizen, whether the recipient is a corporation or an individual, the public must be able to rely on the assurances in that document.

At the same time, citizens in our society whether they are native or non-native cannot be permitted to take the law into their own hands, whether to remove an encroaching fence, or cut down a neighbour's tree, or to block access to a public roadway.

As I followed the news reports of the Caledonia standoff, I wondered what would have happened if the Haldimand grant had been for an area of 10 km on each side of Toronto's Don River instead of the Grand River, and if a group of protestors blockaded the Don Valley Parkway in violation of a court order? I doubt that blockade would have lasted longer than a few hours.

The fact is that since 1973, Canadian courts have recognized that aboriginal right to land, even without a specific written deed, can survive the arrival of Europeans and subsequent legislation by Canadian parliaments.

This means that we have, in Canada, two distinct systems of land ownership. Occasionally, as with the Douglas Creek subdivision, these systems conflict with each other. When they do, it's up to our governments to balance and reconcile those conflicts for the benefit of the aboriginal claimants, the deed holders and society at large.

Exactly how they do it is a very delicate task. The Caledonia blockade was not our government's finest hour.

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