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### Aboriginal Land Claims: A Primer on the Elephant in the Room

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Recent events such as those in Caledonia, Ontario demonstrate the devastating effect that unresolved Aboriginal land claims can have on property owners, vendors, purchasers and developers.

Property owners who unknowingly purchase lands that are subject to an Aboriginal land claim may later find that their property value has suddenly decreased significantly. Developers may find themselves in similar situations with their proposed development subject to enormous delays and additional costs as a result of opposition by Aboriginal groups claiming title to that land.

#### What is an Aboriginal Land Claim?

A land claim is a formal assertion by an Aboriginal community that it has legal entitlements over a tract of land. Aboriginal land claims generally fall into two categories:

1. comprehensive land claims, which are based on Aboriginal title, and
2. specific land claims, which generally include allegations of non-fulfillment of terms under a treaty or improper dealing with reserves as regulated by the *Indian Act*.

In short, comprehensive land claims are claims made by First Nations who have not entered into a treaty with the Crown and are based on the assertion of continuing Aboriginal title to the lands in question. Aboriginal title arises by virtue of the Aboriginal people's prior occupation of the lands which were never extinguished or surrendered to the Crown by treaty. Prior to modern times, the treaty process across provincial regions in Canada was inconsistent. For example, while most of the land area of Ontario is subject to historical treaties, only a small portion of the land area of British Columbia is. Therefore, Ontario has far fewer comprehensive land claims than British Columbia.

Now, a further word or two about specific land claims. Many historical treaties provide that Aboriginal peoples give up their title to the land in exchange for reserves, small annual payments, and the right to hunt and fish off the reserve in certain circumstances.

Specific land claims include claims by First Nations of non-fulfillment of terms under a treaty, the improper administration of lands by the government, that tracts of lands were illegally taken away from

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reserves, that lands have been illegally occupied or that reserves were not surveyed correctly. Treaty land entitlement ("TLE") claims refer to lands that the Crown failed to provide to First Nations under the terms of a treaty. According to Indian and Northern Affairs Canada, a total of 277 land claims have been filed in Ontario and 522 have been filed in British Columbia against the federal government.

These claims relate to allegations that the federal government failed to provide lands as required by treaty, took reserve lands without a proper surrender, failed to live up to the terms of a reserve land surrender, failed to protect reserve lands in violation of the Crown's fiduciary duty, or mismanaged First Nation trust funds. There are also claims that certain lands were never given up by treaty; that is, that the First Nation still has Aboriginal title to the lands.

### **Coping with Outstanding Aboriginal Land Claims**

Unless the Aboriginal title or treaty right was extinguished prior to 1982 or surrendered or otherwise given up by treaty, such Aboriginal land claims continue to be a burden on the Crown's underlying title and, in some cases, may even bring into question the validity of the Crown patent.

This was the case in *Chippewas of Sarnia Band v. Canada (Attorney General)*, which involved an action for the recovery of private lands over a large area within the City of Sarnia, which was formerly part of the Chippewas' reserve.

Fortunately for the innocent landowners, the Court found that the Aboriginal title and treaty rights in the disputed lands were extinguished by the application of a modified defence of *bona fide* purchaser for value without notice. The Court considered the Chippewas' 150-year delay in asserting their claim and the reliance of innocent third parties on the apparent validity of the patents. This modified doctrine of *bona fide* purchaser for value without notice was based on balancing the interests of innocent landowners with that of an innocent First Nation, where the First Nation interest could be satisfied by receiving damages from the Crown for a breach of fiduciary duty.

### **Discovering Outstanding Land Claims**

This raises the question of the scope of the title search that would be necessary to preserve the modified defence of *bona fide* purchaser for value without notice. The issue is further complicated by the fact that there is currently no adequate mechanism for searching whether a property is subject to a land claim. The courts have indicated that notice of an Aboriginal land claim is not an interest that is capable of being registered on the Land Registry in either British Columbia or Ontario pursuant to the applicable *Land Titles Act*. The federal and provincial governments have websites that contain information on the various outstanding land claims alleged by First Nations. These sites, however, are by no means kept current daily nor are they guaranteed to be comprehensive. This area of law is still developing.

### Is Title Insurance a Viable Option?

Currently, many standard title insurance policies contain specific exclusions with respect to Aboriginal title claims. Given the risks involved, it would be unlikely that title insurers would be willing to provide coverage for risks related to Aboriginal land claims. There are situations where title insurers may be willing to provide some limited coverage, such as when the First Nation is not seeking a return of the lands but only compensation, and the negotiations with the government are close to settlement.

### Some Final Thoughts

Aboriginal land claims continue to be an active issue for the real estate industry, particularly as development spreads beyond the well-established urban centres of the country, where opportunities for development are increasingly scarce. Regrettably, Aboriginal land claims, whether in the form of Aboriginal title or treaty lands, if left to be resolved between the government and the First Nations on their own, will continue to infuse uncertainty and unpredictability into real estate transactions.

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