Textual Qualifications in the Title Registration System

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When the title registration system was introduced in Colchester County in March 2003, two misconceptions came to light during the introductory *Land Registration Act* (LRA) training. The first was that the LRA operated as some sort of title cleansing machine, as if messy titles were placed on a conveyor belt, run through the machine, and emerged at the other end in pristine condition. The second represented the other end of the spectrum– that only perfectly 'clean' titles could be registered under the LRA. Neither was correct, but they became the fodder for many interesting discussions during Module Four sessions in Truro and Halifax.

The fact is that the LRA accepts messy titles[1]. That said, the flaws need to be exposed in the parcel register. "How messy is too messy?" was asked more than once during those Module Four sessions. Good question. The short answer is that the certifying lawyer must be able to certify a quantifiable or describable title that is held by a named registered interest holder. The Province cannot guarantee fee simple ownership to 'no one in particular'. Nor can the Province guarantee fee simple ownership in the alternative, or provide a guarantee to no interest whatsoever.

Qualifications on the registered interest are a source of ongoing discussion in LRA training. Perhaps the most interesting part of any Module Four session is listening to the debate over whether a particular qualification on title is appropriate or not. Ultimately, that decision belongs to the certifying lawyer. Service Nova Scotia and Municipal Relations (SNSMR) staff do not vet textual qualifications or any other aspect of a lawyer's opinion on ownership of the registered and lesser interests in a parcel. The responsibility to ensure that the textual qualification is appropriate, and appropriately worded, is therefore squarely on the lawyers'

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[1]See *Land Registration Act* subsection 20(2), which speaks of the registered interest in a parcel register: The interest defined in the register is a registrable interest subject to any limitations, additions or encumbrances specified when the interest was added to the register or that have been added to the register.

shoulders. This of course is integral to a system that depends on lawyers to set all aspects of the title 'baseline' fort registered parcels. What use have Authorized lawyers been making of the Textual Qualifications box[2] on Applications for Registration (AFRs)?

As of January 27, 2005 there were 21,792 parcels registered under the LRA. Fully 1282, or approximately six percent, of these registrations included textual qualifications. The qualifications can loosely be organized into five main categories:

1. Appropriate, fully in keeping with the LRA, the Regulations and *Practice Standards for Real Property Transactions in Nova Scotia* as promulgated by the Nova Scotia Barristers' Society (NSBS);

2. Appropriate, appearing as a textual qualification only because of the functional characteristics inherent in the software;

3. Apparently appropriate, but lacking in clarity;

4. Inappropriate but harmless, giving information than is not required; and

5. Inappropriate, indicative of possible non-compliance with the LRA. These will be selected for routine audit by the NSBS.

Let us review actual examples of textual qualifications in each of the five categories. What follows are qualifications that exist in the registered title fabric today. They have only been

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[2]The textual qualifications text box on the AFR can be found in the "burdens/qualifications on the registered interests" section, just below the "benefits/appurtenances to the registered interests" category and just above "Tenants in Common not registered pursuant to the *Land Registration Act*". Authorized lawyers are invited to enter "Qualification Text", in free form. The text box permits many thousands of characters to be entered, as we will see from some of the examples *infra*.

altered to obscure the identity of persons named in the qualifications. The examples are not meant to single out any authorized lawyer for praise or otherwise. These qualifications are part of the public record and are reproduced here as a teaching tool only.

Category I: Appropriate, fully in keeping with the LRA, the Regulations and *Practice Standards for Real Property Transactions in Nova Scotia* as promulgated by the Nova Scotia Barristers' Society (NSBS)

This category is limited to those textual qualifications that are totally in keeping with the scheme of the Act and outline title flaws that exist on the face of the record but that in no way prevent registration under the LRA.

Example 1:
THE EASEMENT CREATED FOR THE PURPOSE OF DRAWING WATER FROM THE WELL LOCATED ON PID 12345678 IS IN THE NATURE OF A QUASI EASEMENT, DUE TO THE UNITY OF OWNERSHIP BETWEEN THE DOMINANT AND SERVIENT TENEMENTS.

The qualification explains the limitation on the benefit that attaches to the registered interest. Note that recent LRA amendments have thrown over the common law rule that required that the dominant and servient tenements be held in different ownership.[3]

Example 2:
THE PROPERTY IN QUESTION WAS CONVEYED TO GERALD OCTANE BY DEED DATED JULY 26, 1979 AND RECORDED IN BOOK 382 AT PAGE 473 BY MOST OF THE HEIRS OF MILDRED AND JOHN OCTANE. BASED ON LOCAL INQUIRY NOT ALL THE HEIRS OF MILDRED AND JOHN OCTANE SIGNED THE DEED. THE TRANSFER IS

[3]See LRA Section 19A: 19A (1) A person who owns a registered interest in a parcel may grant an easement in the parcel for the benefit of another parcel that the person owns. (2) The easement shall continue to exist notwithstanding subsequent vesting of the dominant and servient tenements in the same person absent an express release of the easement.

SUBJECT TO THE OUTSTANDING INTERESTS OF THE HEIRS OF MILDRED AND JOHN OCTANE WHO DID NOT SIGN THE DEED RECORDED IN BOOK 382 AT PAGE 474.

This outlines the limitations on title of the holder of the registered interest and is therefore an appropriate qualification.

Example 3:
TITLE IS SUBJECT TO THE POSSIBLE OUTSTANDING INTEREST OF THE HEIRS OF FRANK SMITH WHICH INTEREST AROSE UPON HIS DEATH IN 1942. THE FIRST DEED CONVEYING PART OF THIS LAND FROM SOME OF THE HEIRS OF FRANK SMITH IS A WARRANTY DEED TO WILLIAM F. JACOBS DATED MAY 13, 1968 AND ON RECORD AT THE REGISTRY OF DEEDS FOR CUMBERLAND COUNTY AS DOCUMENT NO. 1285 IN BOOK 250 AT PAGE 564. THE DEED CONVEYING THE REMAINDER OF THIS LAND IS A DEED WITHOUT COVENANTS FROM SOME OF THE HEIRS OF FRANK SMITH TO WILLIAM E. JACOBS DATED JUNE 16, 1997 AND RECORDED AT THE REGISTRY OF DEEDS FOR THE COUNTY OF CUMBERLAND AS DOCUMENT NO. 2894 IN BOOK 665 AT PAGE 750.

This qualification arguably goes into unnecessary back-title detail, but it states the nature of the title flaw and also gives a reference point for subsequent observers to assess the applicability of LRA subsection 75(1A).[4]

Example 4:
PREVIOUS DECRIPTIONS (sic) INDICATE A POSSIBLE EASEMENT GRANTED BY DOMINION STRUCTURAL STEEL LIMITED TO NOVA SCOTIA LIGHT AND POWER COMPANY LIMITED BY AN INDENTURE DATED JULY 1, 1960. NO RECORD OF THE EASEMENT WAS FOUND AT THE REGISTRY.

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[4] 75(1A) An owner of an undivided interest in a parcel may acquire the whole interest in the parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act.

This is an appropriate qualification because it alerts observers to a possible burden, one which cannot be verified by reference to a registered instrument, but which may affect the fee simple. The lawyer did not feel free to ignore the existence of the burden, given the specific back-title reference in the description.

Category II: Appropriate, appearing as a textual qualification only because of the functional characteristics inherent in the software

This category is limited to those textual qualifications that outline burdens on the fee simple that cannot be entered as such on an AFR. For example, plans cannot be enabling instruments in the system, yet expropriations in Halifax County and Development Agreements in Colchester County were traditionally indexed as plans. Similarly, if an easement burden exists in the professional judgment of an authorized lawyer, but the grant is not registered under the *Registry Act*, then it is appropriate to list the interest under textual qualifications. It is equally appropriate to place these burdens as unregistered interests on the AFR, but that is another topic for another day.

Example 1:
THE PROPERTY IS SUBJECT TO TWO EASEMENTS TO THE NOVA SCOTIA POWER CORPORATION AS SHOWN ON THE PLAN OF SUBDIVISION PREPARED BY BLOGGINS SURVEYS LIMITED DATED MARCH 15, 1990 AND FILED AT THE REGISTRY OF DEEDS FOR THE COUNTY OF ANTIGONISH ON THE 11TH DAY OF APRIL AS PLAN NO. 1234.

Example 2:
SUBJECT TO A DEVELOPMENT AGREEMENT WITH THE TOWN OF BIGLEY DATED THE 11TH DAY OF AUGUST, 1990, FILED AS ADMINISTRATION PLAN #7896.

In these cases, the lawyer was satisfied that the easements or agreement existed and that they burdened the parcel. In each case, however, the instrument was unregistered or did not

have a book and page to reference on the AFR.

Category III: Apparently appropriate, but lacking in clarity

Example 1:
SUBJECT TO A POTENTIAL RIGHT OF WAY IN FAVOUR OF JACOB SMITH HIS HEIRS AND ASSIGNS.

In this case, the lawyer leaves it to the imagination as to whether there is definitely a right of way that may or may not be exercised by the named individuals, or whether there may or may not be a right of way.

Example 2:
RESERVING A RIGHT OF WAY FOR THE BENEFIT OF LANDS OF JOHN SMITH AND LANDS OF ROBERT SMITH, IF NECESSARY.

An observer is unable to determine whether John Smith enjoys a right of way, but Robert Smith doesn't (unless a right of way is necessary) or if John and Robert Smith both enjoy the benefit of a right of way over the registered parcel, but only if necessary. The exact state of affairs is impossible to discern from the wording of the qualification[5].

Category IV: Inappropriate but harmless, giving information that is not required

Example 1:
VARIOUS EASEMENTS WERE GRANTED BY THE PREDECEASORS [sic] IN TITLE OF THE PARENT PARCEL FROM WHICH THE WITHIN LANDS WERE DERIVED. IT IS MY

[5]It is entirely possible that the wording for the qualification is taken directly from a deed or grant, in which case the deed or grant could have been selected as the enabling instrument for the burden. That might still leave the lawyer with having to do a textual qualification because of the "if necessary" statement.

OPINION THAT NONE OF THESE EASEMENTS AFFECT THE LANDS THAT ARE THE SUBJECT OF THE WITHIN APPLICATION FOR REGISTRATION.

Example 2:
FOR INFO ONLY: STATUTORY DECLARATION: BOOK 1492, PAGE 290, DOCUMENT NO. 75119306, YEAR: 2003 STATUTORY DECLARATION: BOOK 1482, PAGE 293, DOCUMENT NO. 75119314, YEAR: 2003 STATUTORY DECLARATION: BOOK 1482, PAGE 746, DOCUMENT NO. 752121740, YEAR: 2003

Example 3:
THERE WAS A RIGHT OF WAY GRANTED OVER THE LARGE LOT OF LAND OUT OF WHICH THE SUBJECT PROPERTY WAS CONVEYED OUT. THIS RIGHT OF WAY IS RECORDED AT BOOK 212 PAGE 648. THIS RIGHT OF WAY DOES NOT APPEAR TO AFFECT THE SUBJECT LOT BUT MAY BE THE ROADWAY WHICH RUNS NEXT TO SUBJECT LOT TO THE EAST BUT IS NOT ON THE LOT.

Example 4:
ELIZABETH SMITH MACDONALD OBTAINED TWO LOTS OF LAND AT LISMORE, PICTOU COUNTY, FROM SHEILA MACDONALD BY DEED RCORDED (sic) IN BOOK 398 PAGE 11. SUBSEQUENTLY, A DEED FROM THE THREE CHILDREN OF ELIZABETH SMITH MACDONALD TO THEMSELVES AS JOINT TENANTS IS RECORDED IN BOOK 724 PAGE 93A. THIS DEED RECORDED ON MAY 1, 1978, GIVES THE DATE OF DEATH OF ELIZABETH SMITH MACDONALD AS NOVEMBER 12, 1977, AND REFERS TO THE LAST WILL AND TESTAMENT OF ELIZABETH SMITH MACDONALD DEVISING ALL REAL PROPERTY TO THE GRANTORS. THIS WILL COULD NOT BE LOCATED IN PICTOU REGISTRY OF PROBATE. SUBSEQUENTLY, THE DEED FROM THE THREE CHILDREN OF ELIZABETH SMITH MACDONALD TO THE REGISTERED OWNERS REFERS TO THE WILL OF COL. RONALD ST. JOHN MACDONALD DEVISING HIS PROPERTY TO HIS THREE CHILDREN, BUT THIS PROPERTY WAS ACQUIRED BY HIS WIDOW AND PASSED TO THE THREE CHILDREN BY THE WILL OR INTESTACY OF ELIZABETH SMITH MACDONALD.

Example 5:
MARY SMITH PREDECEASED JOHN SMITH SO THEREFORE AT THE TIME OF JOHN'S DEATH HE WAS THE SOLE OWNER OF THE PROPERTY.

Example 6:
PROBLEM IN BACKTITLE - A QUIT CLAIM DEED (BOOK 484, PAGE 631)INADVERTENTLY LEFT OUT ONE PARCEL. GRANTORS MOVED TO NEW BRUNSWICK AND SINCE DECEASED. COPY OF LETTER DATED SEPTEMBER 18, 1979 BY SOLICITOR REPRESENTATIVE INDICATES SETTLEMENT ACCEPTANCE BY THE DECEASED (COPY WILL BE SUBMITTED IN BUNDLE), FOLLOWED BY THE AFORESAID DEED IN BOOK 484, PAGE 631 WITH INADVERTANT (sic) OMISSION. WE ARE CERTIFYING OVER THIS.

These sorts of qualification are quite common; they appear to be an attempt by the lawyer to justify or explain his or her title opinion. They invite the observer to "peek behind the curtain" that was drawn over the historic title when the parcel was registered. Such explanations are unnecessary given the guarantee inherent in registration under the LRA[6]

It is important to remember that the net result of the lawyer's title investigation, i.e. the registered and recorded interests as shown in the parcel register, are the only interests that need to be shown in the parcel register. What happened in the past is more of a roadmap to the lawyer's reasoning behind the ultimate title opinion, and is therefore superfluous. If the information is being offered to assist in acceptance of the draft AFR, the details should be placed in the comments section of the AFR. Comments are seen only by registry staff. If the comments are offered as a justification for the opinion, they should be placed in the abstract for reference by NSBS auditors.

[6]See subsection 20(1): The registered owner of a registered interest owns the interest defined in the register in respect of the parcel described in the register, subject to any discrepancy in the location, boundaries or extent of the parcel and subject to the overriding interests.

Category V: Inappropriate, indicative of possible non-compliance with the LRA, to be selected for routine audit by the NSBS

Example 1:
ACCESS TO PROPERTY IS BY WAY OF NOVA SCOTIA POWER ROAD, BUT NO REGISTERED INSTRUMENT ALLOWING FOR A RIGHT OF WAY OVER THE NOVA SCOTIA POWER ROAD. HOWEVER, ROAD HAS BEEN USED TO GAIN ACCESS TO SUBJECT PROPERTY IN EXCESS OF 20 YEARS.

The obvious comment would be "Says who?". The appropriate place to build the case of a right of way by prescription is in the vault at the Land Registration Office, i.e. via statutory declaration or declarations registered under the *Registry Act*. This would be in keeping with Professional Standard 3.2.[7]

Example 2:
CAN ONLY FIND ROOT OF TITLE BACK TO 1966 AT BOOK 238 PAGE 221. THERE IS A RECITAL IN THE 1966 DEED STATING THAT THE GRANTOR REC'D THE LANDS BY WAY OF DEED DATED 21 SEPTEMBER 1954 BUT NOT YET RECORDED.

This qualification appears to have the lawyer admitting that he or she has failed to comply with the title certification standard contained in LRA clause 37(9)(a).[8]

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[7] Professional Standard 3.2 includes the following statements: "A lawyer must document facts evidencing possession. This should be done with the best possible and reasonably attainable evidence, such as recorded affidavits or statutory declarations provided by persons such as surveyors and neighbouring property owners".

[8]The solicitor's opinion of title shall be based upon an abstract of the title certified showing the chain of ownership of the parcel(a) to the standard required to demonstrate a marketable title pursuant to the *Marketable Titles Act* or to the standard required pursuant to the *Limitation of Actions Act* or any other enactment or the common law.

Example 3:
ROBERT AND JUDITH SUMMERS ARE THE BENEFICIAL OWNERS OF THIS PARCEL

...Which raises a red flag, because the registered (guaranteed) owners are John and Mary Brown, who were the grantors in the deed to the current registered owners.

Example 4:
THIS LOT IS ONE OF 10 LOTS IS (sic) SUNNY COVE SUBDIVISION. THE SUBDIVISION HAS A PRIVATE ROAD WHICH LEADS TO MAPLE ROAD, A PUBLIC ROAD. THERE IS NO EXPRESS GRANT OF RIGHT OF WAY IN THE DEED, BUT THE PRIVATE ROAD HAS BEEN USED BY OWNERS OF THIS PARCEL FOR WELL OVER 20 YEARS . CLEARLY THERE IS A RIGHT OF WAY ON THE BASIS OF IMPLIED GRANT, DOCTRINE OF LOST GRANT, AND OR CREATION OF RIGHTS BY PRESCRIPTION.

This may be a proper legal conclusion but is unsupported by any evidence of the benefit. Professional Standard 3.2 was not followed.

All textual qualifications that fall into this final category will be the subject of a routine audit[9] by the NSBS. As with randomly-selected AFR bundles, these routine audits will not necessarily result in a finding of non-compliance by the NSBS auditors. They do, however, warrant closer inspection.

[9]AFR bundle audits fall into two categories, routine and targeted. Routine audits are either chosen by random number selection, or else are chosen for audit because they display certain risk factors. Late bundles and certification based on possession are two other risk factors that will result in routine audit by the NSBS.

Conclusions

Several generalizations may be drawn from the system's experience with textual qualifications to date:

- SNSMR staff do not vet a lawyer's opinion. There are a few acceptance/rejection criteria followed by staff in processing AFRs, but they do not amount to acceptance/rejection of the opinion itself.[10] It is up to the lawyer to determine the content of the qualification. Acceptance of the draft AFR by SNSMR staff does not imply some sort of approval of the lawyer's title opinion or textual qualifications.

- Textual qualifications should not be used when the lawyer is intending to "speak to" staff who will be processing the draft AFR. This 'conversation' should be left to AFR comments;

- Textual qualifications should not recite the basis for the lawyer's exercise of professional judgment. The abstract should do this, together with any title notes as the lawyer deems necessary;

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[10]AFR Acceptance/rejection criteria are explained in the "AFR Process Steps for Clients" document that is posted on the lawyers' resource pages on the web. They are summarized as follows: Staff reviews the draft AFR for pre-approval comparing the AFR document and interest information to the information contained in Property Online. The staff person does not accept the draft AFR when:
a) There is a more recent conveyance document against the parcel in Property Online than the owner-enabling instrument stated on the AFR for that PID or the owner-enabling instrument on the AFR is not present at all on the PID in Property Online, and no explanation is provided in the AFR comments field.
b) The owner on the AFR is not the same as the owner on Property Online and there is no acknowledgement of this difference in the AFR comment field.
c) All benefits and burdens that appear in the certified parcel description do not appear on the draft AFR and there is no comments noting that the PDCA will be amended to reflect the AFR.
d) All benefits and burdens that appear on the AFR are not in the certified description and there is no comment noting that the PDCA will be amended to reflect the AFR.
e) The instrument type or interest type is different from that shown in Property Online and the draft AFR does not include a comment from the lawyer explaining the difference.
f) Interests are placed in an incorrect category on the AFR.

- Lawyers should "make the call" whenever possible–the item that is under consideration is most often either an interest in the parcel or it is not. The lawyer should exercise professional judgment before deciding to qualify title;

- Do not draw legal conclusions in a textual qualification. Qualifications on title are meant to be a summary of the flaws in title that were uncovered in the title search and which, in the lawyer's opinion, derogate from the fee simple;

- Do not give evidence in a textual qualification. Evidence should be placed on the record by following the Professional Standards;

- If you need to qualify title, be specific and unequivocal in your statement. Do not leave it to others (or the Courts) to interpret the meaning of the qualification;

- Do not use a textual qualification to contradict your own opinion on who properly holds the registered interest in the parcel;

- Textual qualifications cannot be used to self-create exemptions from the certification provisions of clause 37(9)(a) of the LRA. If the search reveals a less than marketable title, remember LRA clause 37(9)(b) provides the only alternative to the certification standard under 37(9)(a)[11];

- Textual qualifications may be removed, when appropriate, by using paragraph 8 of the Form 24 (and paragraph 9 when no document accompanies the form, i.e. when the lawyer is exercising professional judgment and removing an inapplicable qualification). The difficulty is that the next lawyer reviewing the parcel register will need to research the qualification in order to remove it.
- Textual qualifications that are unclear or inappropriate could have negative implications

[11]See LRA clause 37(9)(b): sets the marketable title certification standard or (b) to such lesser standard as the Registrar General may approve.

when the parcel owner goes to transfer his or her interest.

Textual qualifications are an inevitable part of a system that does not require pristine title as a prerequisite to registration. With careful drafting, qualifications can be appropriate marker outlining problems with title (transitory or otherwise). If care is not taken, qualifications can be a semi-permanent blight on the integrity of the information in the title registration system.