Abstract of Title

Review of Abstract of Title

After you prepare or procure an Abstract of Title, you should review it carefully to form an opinion as to whether or not there is marketable title and identify any qualifications (Standard 1.3). You need to document this, so as you review, write marginal notations on your search beside any matter requiring comment and/or explanation. Among the items you should consider are:

(1) CROWN INTEREST

Has the land been granted by the Crown? If not, this needs to be noted and addressed.

(2) ROOT OF TITLE (Marketable Titles Act)

Does the Abstract go back to a Warranty Deed or other good root of title executed at least 40 years ago, or for a lesser permitted period (such as for a subsequent Crown Grant, expropriation, Quieting Titles Certificate, etc.)? Also, most of the other available documents on file at the Registry are not appropriate and do not constitute a good root of title. You will need to consult the Marketable Titles Act, Limitation of Actions Act and the Land Registration Act to find a full list of all acceptable Root(s) of title.

It is helpful if you flag the root of title in your abstract as you will need the execution and registration particulars when completing the final migration of the parcel. The selection on the AFR drop-down box is not exhaustive, so try to select the most appropriate entry.
(3) FORM AND CONTENT OF ABSTRACT (Standard 3.1)

Here are some questions you should ask yourself when reviewing an abstract of title:

- Is the abstract in writing and legible and copyable – beware blue, green and red inks??
- Is the abstract complete?
- Are pages (or documents) numbered sequentially?
- Is the abstract in chronological order? (Note the effect of any late registrations.)
- Can the abstract be read and understood without reference to external records or documents?
- Are all relevant documents summarized (or where desirable, copied in full)? (e.g., wills, powers)
- Does the abstract include the original legal description, any changes in the description, any approved plan, and any restrictive covenants?
- Is the first item an acceptable root of title as prescribed by legislation or common law?
- Are details of all recitals and other documents explaining the chain of title included?
- Does the abstract include lists of Expropriations and possible Judgments?
- Does the abstract contain the searcher’s summary of outstanding interests, undischarged securities, etc.? (Such a summary identifying registered interests, benefits, burdens and recorded interests is very useful but must be carefully checked for accuracy and completeness. It may be helpful to read the summary only after you have reviewed the abstract.)

See also the helpful comments of Nathanson, J. in Ratto v. Rainbow Realty (1984), 68 NSR (2d) 44 (S.C., T.D.) at 51

(4) LEGAL DESCRIPTION (Standards 2.1, 2.2, 2.3)

When reviewing the legal description for the LUS (prior to submitting the PDCA), here are some important considerations:

- Is the metes and bounds description complete, current and proper?
- Does the description clearly identify the parcel and meet all LRA requirements?
- Does the description resemble what is depicted in the Property Online graphics? If not, why not? Keep in mind that the graphics have not been prepared by a surveyor. While they are a useful tool, they cannot be relied upon for accuracy.
- Does the description reflect what is shown on any available survey plan or location certificate? If not, can you reconcile any material discrepancies? (Consider having a surveyor prepare a new description if there is a problem.)
- If the description has changed during the abstracting period, does each amendment comply with the legislative requirements for transfer of title to land? If a description originates since April 15th, 1987, is it based on an approved Plan or qualify for an exemption pursuant to s. 268 of the Municipal Government Act? (If there is no subdivision plan, the abstract should include a detailed drawing by the searcher reflecting the changes in the parcel and distances, directions and adjoining landowners.)
- Are typographical errors covered by a “Being and intended to be” clause?

See PDCA checklist in module 2. You are certifying to compliance on submission.
- Are all benefits and burdens (e.g. easements) properly shown, and have you made due enquiry as to the corresponding benefits or burdens on any other affected parcels, whether registered or not? More on this in Modules 2 and 3

(5) **CHAIN OF OWNERSHIP (See Name Standard 4.3)**

When reviewing each document in the chain of title, consider:

- Are all owners, the manner in which title is taken, and the extent of each interest identified?
- Has title passed effectively from the original owner(s) and each subsequent owner?
- Are any changes in the names of owners satisfactorily documented?
- If an owner has died, did his or her interest pass properly through joint tenancy, probate or intestacy?
- If an interest passed by inheritance:
  - Is a copy of the pertinent death certificate recorded or a recital over 20 years old registered?
  - Is sufficient probate information filed in the Registry of Deeds or if not, has the Probate file been checked and reported on?
  - Is there adequate documentation of the heirs at law in the case of intestacy? *(Descent of Real and Personal Property Act from February 21\(^{st}\), 1924; Descent of Property Act from February 21\(^{st}\), 1955; Intestate Succession Act from September 1\(^{st}\), 1966, including the significant amendment of December 13\(^{th}\), 1975.)*
  - Has the widow made an election with respect to the matrimonial home?
  - Is the will registered but not probated, as sometimes happened until relatively recently? If so, this is not effective to pass title.

(6) **COMPETENCE AND CAPACITY**

- Is there anything in the record to suggest a lack of capacity or competence by any grantor?

**SEARCH CONSIDERATIONS**

The following are some specific considerations that you should address, if applicable in your search. Please note: pertinent *Professional Standards for Real Property Transactions in Nova Scotia* are in parentheses.

(1) **ACCESS (Standard 2.3)**

Access is a part of the search. It is important to consider:

- Does the searcher indicate the nature of access to the parcel, if any, and whether such access is public or private?
- If access is public, is it qualified? (e.g., controlled, restricted, listed but not maintained.)
- If access is private, has it been granted?
• If private access has been granted for less than the entire marketable title time frame, is there an abstract of title for the grant of easement?
• If private access has not been granted, is there authority for its continued use in conjunction with the parcel?
• If private access crosses other lot(s), do the description(s) of servient parcel(s) describe the access in the same manner as it is described in the description of the parcel being abstracted?
• If shown on a Plan, does the access granted correlate with the actual traveled way?

See the most helpful paper, and flowchart, of Garth Gordon Q.C. in “Red Flag Issues Under the L.R.A.”, at

http://www.lians.ca/real_estate/real_estate_resources/articles/

• Have the “flip sides” of easements (i.e. the corresponding burden to a benefit, and vice versa) been treated properly, and in accordance with Regulations 10(14) and 14-18 of the Administration Regulations? This is treated in detail in Modules 2 and 3.

(2) BANKRUPTCY (Standards 3.11 and 3.9)

See Registrar General’s Directive 2008-1 at

Also consider:

• Has the receiving order or assignment in bankruptcy been registered?
• Have all required signatures and consents been secured? It may not always be necessary to record a disclaimer or other instrument from a trustee, if there is nothing to indicate an assignment or petition in bankruptcy on the record, but if you know of the bankruptcy you should obtain such a disclaimer as part of your abstract.
• If the seller has made a proposal under the Bankruptcy and Insolvency Act, have all terms of the proposal been met? (This may require inquiry beyond the Abstract.)
• Is the title conveyed by the Trustee’s Deed otherwise marketable?
• Please refer to Paul Radford’s paper, “Judgments/Bankruptcy – Priorities – Things to Watch For In Search” http://www.lians.ca/real_estate/real_estate_resources/articles/

(3) BOUNDARY LINE AGREEMENTS

These must be noted in the parcel description.
(4) BUILDERS/MECHANICS LIENS (Standard 3.18)

Have any undischarged liens been filed? If a *lis pendens* has been filed, has a court order vacating it and all liens sheltering under it been recorded in a timely fashion? See s. 58(1) LRA.

(5) CONDOMINIUMS

Does the Abstract include all documents pertaining to the condominium corporation and common elements as well as the individual unit?

Have you examined parcel registers of migrated units in the same development for purposes of comparison?

(6) CORPORATIONS AND OTHER ENTITIES (Standard 3.13)

If the parcel has been or is being purchased from an entity (such as a corporation, municipal unit, university, church, society or charitable organization), you should examine its memorandum of association, legislation, charter or other incorporating document to determine:

- Has the entity power to acquire, hold and alienate real property?
- Is the entity in existence and good standing?
- Has the entity taken all actions required to authorize the sale?
- Has the entity caused its proper officers to execute (and, if required, seal) the instrument of conveyance?
- Has the entity received any consent required for the intended disposition?

If there is a conveyance from an entity in the chain of title, are you satisfied that the conveyance was properly authorized, executed and delivered? (In exercising your professional judgment on this, you are to consider the availability of supporting evidence, the age and apparent regularity of the conveyance, and any recitals or affidavits contained in the conveyance.)

See s. 83 LRA with respect to signing authority notwithstanding indoor management rules.

(7) CROWN GRANTS and DVLA Grants

Has the land been granted by the Crown? If not, this needs to be noted and addressed. See s.75 of the *Land Registration Act* and the *Limitation of Actions Act*.

In the case of a conveyance by the Director of the *Veterans’ Land Act*, consider s. 5(3) of the VLA which deems such a conveyance to be a Crown Grant. C.W. MacIntosh, Q.C. in his seminal Nova Scotia Real Property Practice Manual (section 5.1D) states that this has the effect of a Federal Crown Grant and “if the property is subject to competing property interests arising under provincial law, there might still be uncertainty as to the title conveyed thereby.”
(8) **DEBENTURES (Standard 3.15)**

If any debentures affect the parcel being searched, do the terms of a floating charge debenture permit the proposed disposition of a real property interest? If so, require a release only if a notice of crystallization has been recorded, or you or your clients have reason to believe that the floating charge has crystallized. If not, the written consent to the proposed disposition must be obtained from the holder.

Note that a floating charge debenture is a potential claim and must be entered as a recorded interest when migrating. If it does not crystallize, it can be removed by operation of law using a Form 24. You will become familiar with this form in later sections.

(9) **EASEMENTS (other than for Access purposes)**

Easements include utility easements, well agreements and others. As with access easements, you must establish if there is good title of the easement which purports to be for or to the benefit of the parcel.

Even if the easement is no longer in use it is not thereby extinguished. For example, a well agreement which was entered into before public water service was provided to the area would still exist, regardless of whether or not the well is still in use. Note the definition of “utility easement” in the LRA as meaning in existence (March 24, 2003), and s. 75 re easements in general being used and enjoyed.

Again, have you checked for compliance with Regs. 16-18 of the Administration Regulations, and the practice directives applicable to these? (see modules 2 and 3)

(10) **ENCROACHMENTS (Standard 2.5)**

- If there is an encroachment by your clients, is it permitted by a written agreement of the adjoining landowner and any mortgagee?
- If not, does it qualify for application of the doctrine of prescription?
- If there are any third party encroachments upon the parcel being searched, flag the abstract for purposes of completing Form 5 (or your own consent/authorization form). Refer to s. 75 of the LRA for the wandering boundary rule to be discussed later.
- If the encroachment is of unknown (at least to the present Owner) duration, you may want to consider the advisability of making a textual qualification.
- If there is an encroachment upon a public highway, it will not be possible to establish adverse possession. However, if the encroachment is upon a public street, see s.314(1) of the Municipal Government Act.

(11) **ESCHEATS (LRA, s. 40(3), (4))**

Has an interest escheated to Her Majesty from the immediate predecessor in title of the applicant? (If not, it is not an interest in a parcel.)
(12) ESTATES (Standard 3.10)

- Does the old Probate Act apply or the new Probate Act that came into force on October 1\textsuperscript{st}, 2001?
- If dealing with an intestacy, which legislation applies? (See the statutes listed in the Chain of Ownership section above.)
- Have all required consents been obtained?
- Is there an Order for Sale, under the old Probate Act or the new one? (While an Order for Sale is not usually required for those who died solvent and with a will, or intestate after October 1, 2001, such an Order may have been issued and you need to determine if that is the case.)
- Does the personal representative possess proper authority?
- Is any testamentary instrument valid?

(13) EXECUTION OF DOCUMENTS (Standard 4.2)

- Have all deeds been properly executed by the registered owner(s), and witnessed?
- If the name of an owner has changed, is there satisfactory documentation of this?
- If a document is signed under a Power of Attorney, is the POA registered or recorded and does it authorize the conveyance?
- Are Releases executed by the original Mortgagees? If not, are Assignments, Amalgamations or Change of Name Certificates registered?
- Have the proper parties executed the documents?

Note there has been some recent debate on the form of affidavit of execution / certificate of an attesting witness – ie if John and Mary Smith are the Grantor, whether the certificate/affidavit should refer to them as “one” or as “two” of the parties. Some instruments saying “two” have been rejected by the LRO. Until resolved, the author suggests using “one” or “John and Mary Smith, the Grantor in the foregoing indenture….” Until otherwise advised by a Registrar’s directive, it may be preferable to avoid document rejection by saying, “John and Mary, one of the parties,” “John and Mary, parties,” or “John and Mary, the Grantor….” rather than “two of….”

(14) EXPROPRIATIONS (Standard 3.16)

- Has the searcher checked for all expropriations affecting the parcel and reported on this?
- If there is such an expropriation, what is the nature of the interest expropriated?

(15) GUARDIANS (Standard 3.12)

If title is being conveyed by a guardian, is there authority for the appointment and has the authority for the guardian to convey been registered (usually a Court Order)?
(16) JUDGMENTS (Standard 3.5; LRA ss. 65-69, LRAR 26(2), 27)

Has the searcher checked for and reported on possible judgments against all owners in the last 20 years? If an amalgamated company has been an owner, have the names of all amalgamating companies been searched? Have nicknames and previous surnames of married women been checked? (There should be a list of the full names of all owners in this time frame and a note showing no judgments if applicable, or abstracts of any possible judgments. If available, the abstract should show court and file number, debt owed, debtor’s address, and plaintiff’s solicitor.)

Are satisfactory Statutory Declarations against possible judgment debtors recorded? If not, can possible judgment debtors who are owners be distinguished under the rules? (See Frank DeMont’s Material Differences Chart and the Judgments Names Exercises.)

Judgments and the material difference rules are covered separately.

(17) LEASEHOLDS (Standard 3.20)

Has a leasehold title been searched in the same manner as a freehold one? A lease granted by the freehold owner is only valid if the freehold owner was such at the time of granting the mortgage. Therefore, the underlying title is very important. Imagine if you owned a camp on leased land. You would want to be sure that you had the right to occupation under the lease and that no one could have you removed prior to the end of the lease period.

(18) LEGISLATIVE RESTRICTIONS (Standard 1.1)

Have you explained any legislative restrictions to your clients and confirmed their instructions?

(A) MATRIMONIAL PROPERTY ACT / VITAL STATISTICS ACT (Standard 1.7)

- Is the marital status of all owners addressed in deeds or declarations?
- Are there any possible outstanding matrimonial or registered domestic partner interests?
- Have documents since October 1st, 1980 complied with the Matrimonial Property Act?
- Have documents since February 15th, 2002 complied with the Vital Statistics Act?

An unreleased dower interest is not an interest in a parcel: LRA, s. 40(2).

(19) MORTGAGES (Standard 3.4)

Has the parcel been released from all mortgages against it?

Note: Pursuant to subsection 40(1) of the Land Registration Act:

… an unreleased security interest in a residential mortgage that is more than forty years old and that has not been amended or supplemented by an instrument registered during the preceding forty years is not an interest in a parcel.
Note: this section does not apply to Commercial Properties

For releases in general, see s. 60 LRA and 28(2) Real Property Act.

(20) OPTIONS AND RIGHTS OF FIRST REFUSAL (Standard 3.17)

- If there is an option or right of first refusal, are the rights created contractual ones or do they run with the land?
- If an interest in land has been created, is it void as infringing the rule against perpetuities?
- If an interest that runs with the land will not be released, have you explained this to your clients and confirmed their instructions?

(21) PARTNERSHIPS (Standard 3.14)

A partnership, as a non-legal entity, cannot hold title to real property: Charles Maclntosh, Q.C., Real Property Practice Manual, s. 1.2A. It may, however, pass to the individual partners. Accordingly, all partners must sign personally or by representation.

If the chain of title includes a deed vesting title in a partnership:

(a) How was title taken?
(b) Did all partners required to execute the conveyance sign personally or by a duly authorized representative?

(22) POSSESSORY TITLE OR PRESCRIPTIVE RIGHTS
(Standards 3.2 and 3.3; LRA ss. 73-76)

Possessory title is a critical part of property law in general, and has undergone considerable change under the LRA. It is discussed in detail in Module 3. For current module (title enquiry) purposes, consider:

Is there adequate recorded documentation to support a professional opinion that possessory title or a prescriptive right has been established? (e.g., recorded affidavits or statutory declarations by knowledgeable and disinterested persons such as surveyors or neighbouring property owners)

Full copies of documents evidencing possessory title or prescriptive rights should be included. Remember that there may be limits on prescriptive rights under acts such as the Public Highways Act and Municipal Government Act.

While the fundamentals of establishing adverse possession or prescriptive rights may not have changed significantly (with the exception of the period of occupation/use required) with the introduction of the LRA the ability to cause irreparable harm to third parties has increased as a consequence of the fact that the lawyer’s opinion improperly expressed may deprive a rightful owner of his/her property rights.
In the case of prescriptive easements, has the “flip side” been documented on the public record through the relevant provisions of Regulations 14-17?

As pointed out by Catherine Walker in her “Certifying Title and Qualifying Title Under the Land Registration Act” paper:

“The fact that the public record includes a statutory declaration or declarations purporting to establish possessory title (or for that matter a prescriptive right) is not determinative. The lawyer reviewing the Abstract must exercise professional judgment, in the context of the applicable legislation, and the Professional Standard.”

(23) POWERS OF ATTORNEY (Standard 4.1; LRA, s. 72)

- Have you reviewed the Power of Attorney to ensure that it is effective to do what it purports to do? (e.g., if the POA is for an incompetent person, is it a duly executed Enduring Power of Attorney?)
- Was the Power of Attorney executed before the instrument made under it?
- Has the Power of Attorney been recorded?
- Is the matrimonial status of the grantor under a Power of Attorney reflected in the abstract?
- Is the affidavit of execution based on the attorney’s personal knowledge and belief?

(24) PUBLIC ROADS OR STREETS

Is title to the property affected by the Public Highways Act or other such statute? (For example, is a portion of the described parcel used as a public highway or street, or is there evidence of encroachment of buildings upon a public highway or street? If so, is there a registered license (benefit) and does it comply with s. 314 of the Municipal Government Act? Remember that one cannot acquire possessory title to a public highway or street.)

If a street is not public, is there a license to use it?

(25) QUIETING TITLES ACT (Standard 3.19)

Have you examined the certificate and advised your clients regarding the exceptions in the certificate and in the Act?

(26) QUIT CLAIM DEEDS

These require special scrutiny. Is something less than the entire interest being conveyed? For a discussion of Quit Claim Deeds as roots of title, see “The Root of Title” section of these materials.
(27) RECEIVERSHIPS (Standard 3.11)

If a deed is from a receiver where there are no subsequent encumbrancers, is the deed executed by the receiver and (in the absence of a court order) the company granting the debenture security?

If the deed is from a receiver where there are subsequent encumbrancers:

(a) is the deed executed by the receiver and
(b) is the order approving the sale registered (or have all subsequent encumbrancers released their encumbrances to the extent of the interest being conveyed)?

Is the title conveyed by a Receiver's Deed otherwise marketable?

(28) RECITALS (Standard 1.6; Vendors and Purchasers Act, s. 2(a))

If you are accepting recitals as rebuttable presumptions of fact, are they at least 20 years old? Is the wording of the recital sufficient for the intended purpose?


(29) RESTRICTIVE COVENANTS (Standard 3.6)

If there are any, are there breaches that would affect the use of the parcel or its marketability? Have the covenants expired or is there a date upon which they will expire? Is there an expiry date? If so, and if that expiry date is in the future, consider using a textual qualification to flag the expiry date.

(30) SHERIFF’S DEEDS (Standard 3.8)

Is the title conveyed by a Sheriff’s Deed otherwise marketable?

A Sheriff’s Deed is just another link in the chain of title. It conveys the interest of the mortgagor at the time the foreclosed mortgage was granted. It has no curative effect upon prior title flaws and has no impact upon prior mortgages, judgments, liens, etc.

(31) STATUTORY REFERENCES

Does the Abstract note sections of all public or private statutes that affect the Parcel?
SURVEY PLANS (Standard 2.4)

- Has the searcher checked for all relevant survey plans and enclosed full copies?
- Are there any material discrepancies between the description or other abstract information and a survey plan? If so, can you reconcile them? For example, are the bearings expressed consistently as magnetic, grid or astronomic, as the case may be?
- If there is an applicable subdivision plan, has the parcel under search has been approved and if so, do any conditions apply to it? Among other things, check for any easements (whether or not documented by grant) that may be shown, encroachments either by buildings owned by your client or owners of adjoining parcels, errors in the description, plan or graphic, and evidence of consolidation or subdivision which is not reflected in the parcel description.

TAX DEEDS (Standard 3.7; Municipal Government Act, s. 156)

Tax Deeds constitute a good root of title six years after registration (as opposed to date of execution) of the deed. Prior to that time, a Tax Deed is just another link in the chain of title. Whether or not the Tax Deed was registered more than six years prior to the search, you should look at prior deeds in the chain to see if there is a reference to easements or exceptions. See s. 156(3) MGA.

TRUSTEE’S DEEDS (Standard 3.9, S. 28 LRA)

Are the terms of the trust met (on the face of the record or as known to you)?

Is the title conveyed by a Trustee’s Deed otherwise marketable?

WATERS – TIDAL AND NON TIDAL (Standard 2.6)

Does the parcel border on any water?

If the parcel boundary is under or adjacent to water, have you cautioned clients of the danger that all or some of the parcel may be “infill” and lost through migration?

Consider whether the waterfront is federal or provincial. Possessory title cannot accrue against federal lands unless it existed and matured prior to 1950.

See Anthony Chapman, Q.C., Of Wharves, Waterlots and Kings, in the "Conveyancing" tab under http://www.lians.ca/real_estate/real_estate_resources/articles/
REPORTING AFTER REVIEW (STANDARD 2.4)

Once you have reviewed the Abstract, you must explain (and report in writing) any qualifications to your clients and obtain their instructions, and note these in your opinion of title to the Registrar General. Remember to qualify every opinion as being “subject to survey”. You should write marginal notations on the Abstract regarding any exercise of your professional judgment.

Bear in mind the requirement that the abstract be complete and that it must be capable of being read and understood by a person who has not searched the title, without reference to any documents or records external to the abstract. If you have reached certain conclusions, document them in the abstract. This is your opportunity to speak with the Auditor or with others who might be reviewing the abstract.

*Please refer to the sample abstract attached*