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TAB 10

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Uncertified Instruments on Closing and Common Reasons the LRO Bounces Your Instruments

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Safeguarding Real Estate Transaction 2019
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Best Practices Relating to Court Orders

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Uncertified Instruments on Closing
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Part 1 – Certification of instruments under the *Land Titles Act* – a brief refresher

Torrens title is structured to encourage reliance on the parcel register: the register is supposed to be a mirror of the state of title (subject to certain statutory exceptions), and act as a curtain we needn't look behind in investigating title. If there is an error on the register that prejudices a party relying on such a register, the Land Titles Assurance Fund acts as an indemnity.

An important qualification to this reliance is the distinction between an instrument that has been submitted for registration, and an instrument that is in fact registered. The submission of a Land Titles instrument and its appearance on the parcel register does not engage the assurances of Torrens title. Instead, an instrument received for registration is subject to review (and possibly rejection) after its submission. Torrens assurances are engaged only once the instrument is certified on the parcel register.

The unwieldy, 216-word single sentence that is s. 78(2) of the *Land Titles Act,* along with s. 78(3) provide the ground rules on submission of an instrument for registration:

> 78(2) Subject to the regulations, an instrument received for registration shall be registered in the order of time in which it is so received, unless before registration is completed it is withdrawn or the land registrar decides that it contains a material error, omission or deficiency or that there is evidence lacking that the land registrar considers requisite or declines registration for any other reason, and notifies the parties or their solicitors accordingly within twenty-one days after being so received and allows a period of time not less than seven and not more than thirty days from the date of such notification for correction of the error, omission or deficiency or for furnishing evidence and, when the error, omission or deficiency is corrected or evidence furnished within the time allowed, the instrument has priority as if it had been correct in the first instance, but, if the error, omission or deficiency is not corrected or if evidence is not furnished within the time allowed or if the person desiring registration fails to appeal successfully from the decision, the land registrar may proceed with other registrations affecting the land as if the instrument had not been presented for registration, and the land registrar shall be deemed not to be affected with notice of the contents of the instrument.
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> 78(3) Registration of an instrument is complete when the instrument and its entry in the proper register are certified in the prescribed manner by the land registrar, deputy or assistant deputy land registrar, and the time of receipt of the instrument shall be deemed to be the time of its registration.

Generally stated, these sections provide as follows:

1. The LRO has 21 days to review an instrument for defects.[1]
2. The LRO may return a defective instrument for correction.
3. If the instrument is properly corrected within a stipulated time, it will be certified in its corrected form.
4. If the instrument is not properly corrected within a stipulated time, the instrument is not certified and the registration is of no effect against the land.
5. Regardless of the outcome of 3 or 4 above, instruments subsequent to the defective instrument will be considered for certification.

Until an instrument submitted electronically is certified, it will show in a Teraview folio or on a certificate of registration as "Receipted", and only be changed to "Registered" once certified. Likewise, on a parcel register, it will not contain a letter "C" in the "Cert/Chkd" column of the parcel register.

Part 2 – Uncertified Instruments on Closing

In the course of a closing, recently registered instruments may still be uncertified. In certain cases, such as the discharge of a private mortgage to be discharged simultaneous to a Transfer, this scenario is logistically unavoidable. In other cases, such as the registration of a survivorship application or transmission application on the day of closing rather than weeks or months before, it may more aptly described by conventional practices not always according with best practices. An ideal standard would suggest that instruments that can be submitted for registration soon enough before a closing to permit their certification ought to be so registered.

Instruments that have not been certified do not benefit from Torrens' assurance of title, and therefore require review of their effect and effectiveness more akin to a Registry instrument. How then to deal with them? Should a purchaser's lawyer insist on an extension or refuse to close in the face of an uncertified instrument?

In the author's view, an instrument remaining uncertified in itself is not a valid objection to hinder completing the transaction (in much the same manner that a requisition that is general in nature is invalid), but review of the instrument for possible defects may merit an objection to the ability of a current owner to covey proper title. An objection to an uncertified instrument cannot be arbitrary or capricious, but the nature and effect of any defect informs the appropriate course of action to be taken in the good faith completion of a conveyance.

As an initial step, the uncertified instruments must be reviewed as to possible defects. Certain common defects in registrations are noted in the third part of the paper. These illustrations must be read in addition to the *Electronic Registration Procedures Guide*[2], which provides further guidance as to proper content of problematic registrations.

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[1] It should be noted that if a document is "deemed" certified pursuant to s. 78(s) of the *Land Titles Act* because it was not reviewed by the LRO within 21 days, the LRO will not stop its review and will not simply certify the instrument without review. Even if an instrument is certified (including any instruments "deemed" certified), the Land Registrar always retains rectification rights under s. 158(2) of the *Land Titles Act.*

[2] https://www.teraview.ca/en/serviceontario-electronic-registration-procedures-guide/

Once a defect is established, the nature and effect of the defect must be considered.

Some defective instruments may be fatal to any subsequent instruments, such as an attempted first-dealings in Land Titles Absolute. In these circumstances, a transaction cannot proceed until a valid solution to the defect is attained, as the vendor is unable to make any effective conveyance of title.

Other instruments, such as vesting orders, have the potential to be fatal if defective, but may (nay--should) have been submitted for pre-approval prior to submission. Normal land registration practice for pre-approval is to send the submitting lawyer an e-mail confirming whether the instrument has been pre-approved, therefore evidence of pre-approval should be sought, and provided, to establish that the instrument is in a form acceptable for certification.

Yet other instruments may have a flaw that is not fatal, such as a clerical error or incorrect statement, and the result of the error will be that the instrument is returned for resubmission. While the curable defect does not strike to the core of a conveyance, s. 78(2) requires that the solicitor who submitted the flawed instrument take active steps to remedy it within a stipulated timeframe, otherwise the instrument will be rejected. Accordingly, an undertaking binding a lawyer to take such corrective action, remains a possible recourse.

As a starting point for such an undertaking, the following precedent, presented in a paper on three-party DRA by Joseph Fried, remains a good starting point:

> If any of the Solicitors receive a Teraview message, phone call or other communication from the Land Registry Office after the Closing Date regarding any problem or deficiency concerning any of the Electronic Documents so registered, then the solicitor receiving such message or communication shall forthwith advise the other Solicitors of same, and all Solicitors agree to cooperate with each other in an expeditious manner and take all requisite steps to forthwith correct, re-sign for completeness and re-submit for registration, as and where necessary, any of the Electronic Documents intended to be registered, so that same can thereafter be certified by the Land Registry Office. [3]

Indeed, the incorporation of such a term is currently being proposed for inclusion in the standard-form DRAs by the OBA and FOLA stakeholders on the LSO's Real Estate Liaison Group, as it is reflective of best practices when any instrument is returned for correction, whether anticipated or not.

Part 3 – Learning from others' rejection: Why the LRO bounces your instruments

The remainder of this paper focuses on outlining common reasons for instruments being returned for correction and resubmission, or rejected absolutely. The list and details are not exhaustive, but rather represent some common grounds for return or rejection that have been articulated by land registration staff in conversations with the author.[4]

[3] Joseph Fried, "Document Registration Agreements ("DRA") and the Multi Party DRA." *Closing Documents: Tips and traps*. OBA Institute, February 9, 2017.

[4] The author is most grateful for the time and patience of land registration staff in discussing the common registration fails outlined in this part of the paper.

Estate conveyances

"First dealings"…in Land Titles Absolute?!? On the death of an owner, absent rights of survivorship of remaining co-owners, Land Titles normally requires the production of a Certificate of Appointment of Estate Trustee for a trustee to deal with the land. This requirement does not apply if the deceased owner acquired the property when governed by the *Registry* Act, the property was administratively converted from Registry to Land Titles Conversion Qualified ("LTCQ"), and the deceased still owned the property at the time of death.[5]

The first dealings exception applies to LTCQ converts only. It does not apply to pre-existing Land Titles Absolute properties that were loaded into Teraview from paper Land Titles registers: those parcels were subject to the *Land Titles Act* prior to conversion from books.

Put simply – a Land Titles' parcel's qualifier ******MUST****** be LTCQ to benefit from a first dealings exception. If one registers a Transfer claiming first dealings on a Land Titles Absolute or Absolute Plus parcel, it will be rejected. The most probable solution will be that the vendor must obtain a Certificate of Appointment of Estate Trustee.

Survivorships: The Director of Titles has repeatedly cautioned the profession about the order of submission of a survivorship relative to a Transfer: if a survivorship is registered subsequent to a Transfer when it ought to be registered before, the effect will be that title is bifurcated such that the transferees in the Transfer will take the surviving joint tenant's interest, the effect of the Transfer is to sever the joint tenancy between the surviving and deceased joint tenants, and the deceased joint tenant remains on title as a tenant in common.[6] Hardly anyone's intended outcome.

The single best way to avoid an out-of-sequence survivorship is, ad previously noted, to register the survivorship well before the closing date. The survivorship application is ideally registered on title as soon as an agreement of purchase and sale is entered into by the survivor (if not sooner). No good purpose is served by registering the survivorship on the closing date.

By extension, registration of a Transfer subsequent to an uncertified survivorship that is later rejected may likewise result in unintended bifurcation. While the statements of a survivorship application are relatively uncomplicated and its effectiveness can be ascertained by a quick review of the requirements in the *Electronic Registration Procedures Guide*, "zombie deeds"[7] that were registered after the death of an owner to create a joint tenancy may complicate the matter. As noted in the decision of Macleod-Beliveau J in *Thompson v. Elliott Estate:*

> The Ontario Government's land transfer administrative policy overseen by the office of the Director of Titles, no longer allows "zombie" deeds/transfers to be registered in Ontario's electronic Land Titles system, and they will be rejected for registration if they are discovered."[8]

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[5] For a fuller discussion of the first dealings exemption, see Bob Aaron, "First Dealings Exemption from Probate", *The Six Minute Real Estate Lawyer 2017*, LSUC: November 21, 2017.

[6] Jeffrey W. Lem, "A LOT FROM THE DOT: Timing and Sequence Matters: A Case Study' https://www.teraview.ca/wp-content/uploads/2019/03/A-lot-from-the-DOT-March-25-TIMING-MATTERS.pdf

[7] Jeffrey W. Lem, "A LOT FROM THE DOT: Zombie Deeds are Dead!", May 28, 2020 https://www.teraview.ca/wp-content/uploads/2020/05/A-LOT-FROM-THE-DOT-ZOMBIE-DEEDS.pdf

[8] 2020 ONSC 1004 (CanLII) at para 34

The discovery of a zombie deed normally occurs when a survivorship is registered, and the date of death noted on the survivorship pre-dates the date of the Transfer creating the joint tenancy. Although there is no duty to do so[9], land registration staff often check this sequence, and they can and will refuse certification to a survivorship registered pursuant to a joint tenancy created by a zombie deed. Thus, a certified survivorship application should cause no concern on closing, but an uncertified survivorship should be carefully reviewed to ensure that the Transfer creating the joint tenancy was registered prior to the death of the surviving joint tenant(s). If it was not registered within that timeline, the rejection of the survivorship will result in the same bifurcation as a survivorship registered subsequent to a Transfer.

The Director of Titles will also suspend registration privileges of solicitors discovered registering zombie deeds.

Botched Shares of Capacity on Transfers – a latent surprise: Incorrect entry of mixed capacities of shares of ownership on a Transfer may cause later problems with a survivorship. The classic error of failing to enter a capacity when a joint tenancy was intended (resulting in a tenancy in common, per s. 13(1) of the *Conveyancing and Law of Property Act*) is a classic cause for repair action becoming necessary. But more involved ownership structures with a mix of joint tenants can create similar problems if handled improperly.

Assume that five people are taking title. Purchasers one and two are spouses of one another, and likewise purchasers three and four are spouses of one another. The fifth purchaser is free-standing. The intention may be to create an ownership structure as follows:

> Purchasers 1 and 2 – Joint tenants of each other, 25% share of title
>
> Purchasers 3 and 4 – Joint tenants of each other, 25% share of title
>
> Purchaser 5 – freestanding 50% share of title.

In such a scenario, the transferee fields should be recorded as follows:

Name	**Capacity**	**Share**
Purchaser 1	JTEN	Pt. 25%
Purchaser 2	JTEN	Pt. 25%
Purchaser 3	JTEN	Pt. 25%
Purchaser 4	JTEN	Pt. 25%
Purchaser 5	TCOM	50%

Obviously, this creates an initial impression of up to a 150% interest in the property. Furthermore, there is no indicia of who, amongst Purchasers 1 through 4, are joint tenants with whom. Accordingly, Statement 61 **must** indicate which parties are joint tenants of each other (e.g., "Purchaser 1 and 2 as joint tenants of each other as to an undivided 25% share", etc.).

Land registration staff encounter Transfers that state all capacities as TCOM (or blank) and state any joint tenancy intention in Statement 61 – an arrangement that will frustrate later efforts to register a survivorship application once one joint tenant dies.

[9] See *Stonehouse v. The Attorney-General of British Columbia*, [1962] S.C.R. 103, 31 DLR (2d) 118

Separate survivorships and transmission applications: Not uncommonly, an estate sale will show two deceased owners, both on title as joint tenants. For the estate to deal with title, the interest of the owner who pre-deceased passes to their survivor by right of survivorship, and the (now-deceased) survivor's title in turn passes to their estate and is dealt with by the estate trustee, who is entered on title with a transmission application.

For many years, cascading title as described above has been accepted by way of a single, combined survivorship and transmission application, in which statements relating to the initial survivorship are inserted into a transmission application.[10]

Despite this simplified combined procedure (which saves your client the cost of a registration), some lawyers persist in registering a survivorship application, followed by a separate transmission application. It is understood that the current certification practice is to reject the initial survivorship, on grounds analogous to those used in rejecting previously discussed zombie deeds: a free-standing survivorship cannot be registered after the survivor is themselves deceased, because the deceased survivor cannot make the required statements in support of the registration. The transmission application would normally then be returned for correction to insert the survivorship statements.

Writs and Transfer by Personal Representative: When a Transfer is to be signed by both a living transferor and a deceased transferor, a Transfer by Personal Representative must be used to include authorization statements relating to the deceased party. This instrument requires that statements relating to writs be entered manually into statements 3629 or 3630. Land registration staff have noted that Transfers by Personal Representative with living and deceased transferors often omit writ statements on at least one party (usually the living one).

Mortgage Discharges

As mortgage discharges are perhaps the most common uncertified instrument one might encounter on closing, it is welcoming to hear that they are seldom returned for correction. The most common defect is that the discharge may be missing a name change – a defect that can be readily cured by return and resubmission of the instrument (provided of course that the name change in fact happened).

There have been many instances where a discharge has been registered immediately prior to a Transfer Power of Sale. Some lawyers persist in the belief that a mortgage needs to be discharged to facilitate a power of sale. Nothing could be more incorrect – if the mortgage is discharged, that discharge will be certified, and any subsequent Transfer Power of Sale based on that mortgage will be withdrawn (as will any subsequent documents that are based on that Transfer Power of Sale, such as a new Charge given by the transferee.)

Court Orders

Ambiguously drafted or incomplete court orders will not be certified against title. Draft court orders that have not yet been sent for court approval can (and should) be submitted through Onland for pre-approval. Land registration staff will advise as to omissions or defective language, and will accept an issued order once it is issued by the court and tendered for registration. A defective court order that

[10] *Electronic Registration Procedures Guide*, 2017, at p. 188

has not been pre-approved will not be certified unless corrected – which is likely to involve the needless, timely and costly efforts of barristers and a return trip to court.

Some general tips[11] that have been offered to minimize the amount of backing and forthing:

- An order must contain a proper legal description and a PIN. A municipal address is not sufficiently precise.
- If a court order aims to deal with a specific registered instrument, provide the specific instrument number in the order. Specifically, the Order must identify documents by registration number that are to be deleted or not carried forward.
- Do not include personal information in the Order, such as financial details or copies of identification.

Vesting orders: Land registration staff have noted some common errors on vesting orders[12], including such basic information of not expressly naming the party in whom the property will vest. Dates of birth also need to be included in an application to register a vesting order. A registrable legal description is required, often necessitating a reference plan.

Writs are also a common problem – unless a vesting order specifically stipulates that the property is not to be subject to writs upon vesting, the party in whom the property vests takes title subject to writs, which therefore must be searched. The solicitor must enter statements as to the status of writs in Statement 62.

Where the vesting order expressly vests title free and clear of any writs, then the solicitor must add a law statement confirming that all writs against the pre-vesting owner are cut out by the court order.

Section 102 Applications – Cessation of Encumbrances

An application may be made under s. 102 of the *Land Titles Act* to remove a Charge when the land registrar is satisfied both that the Charge is not reasonably available to sign a discharge, and that the Charge has in fact been satisfied.

The procedure for this rare and discretionary recourse is detailed in Bulletin 2017-03[13] and will not be re-hashed in this paper, save for the following extract to underscore the absolute necessity of pre-approval of such applications:

> Under no circumstances may a Section 102 application be submitted directly into the land registration system without approval. Section 102 applications that are submitted for registration without first being pre-approved will be denied certification and be immediately withdrawn without any refund of the registration fees.

A s. 102 application that was not pre-approved cannot be remedied.

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[11] For a general discussion of tips relating to court orders, see Jeff Lem, "Best Practices Relating to Court Orders", *Safeguarding the Real Estate Transaction*. LSO: November 19, 2019. **(Appendix A)**

[12] *Ibid.*

[13] https://www.ontario.ca/land-registration/2017-03-cessation-encumbrance-pursuant-section-102-act

Splits

Erroneously referencing a previous legal description: When splitting a parcel by a Transfer, references to existing metes and bounds descriptions should not be included in the new legal description.

As an example, an existing legal description may be "Pt Lt 14 Pl 543, as in R548392." A resultant reference plan may create two parts from that parcel. To create the split, the new legal description in the Transfer ought to approximate "Pt Lt 14, Pl 543, being Pt 1 Pl 80R3243." The former metes and bounds description ("as in R548392") no longer describes the parcel being conveyed. Yet nonsensical descriptions to the effect of "Pt Lt 14 Pl 543, as in R548392 being Pt 1 Pl 80R3243", or "Pt Lt 14 Pl 543, being Pt 1 Pl 80R3243, as in R548392" are at times submitted for registration -- and returned for correction. As will any subsequent instruments that use the flawed description.

Subsequent instruments not reflecting the split: The new legal description that results from the split needs to be reflected in any subsequent interests before the new PINs are created from the split.

Using the example above as a further illustration, assume a split Transfer is registered to create a separate parcel of "Pt Lt 14 Pl 543, being Pt 1 Pl 80R3243", and the mortgage subsequent to the Transfer uses the pre-split "Pt Lt 14 Pl 543, as in R548392" legal description.

The Charge could create variable consequences, depending on the effect of the split Transfer:

1. If the split Transfer was to a third party, the transferee will not have title to all of "Pt Lt 14 Pl 543, as in R548392", and therefore the mortgage will be returned for correction and resubmission.
2. If the split was a self-to-self conveyance (for example, to enter a Planning Act consent onto title), the transferee on the split Transfer may have title to all of "Pt Lt 14 Pl 543, as in R548392" and therefore the instrument may be certified over all of the resultant parcels, rather than just one parcel that was to have been created by the split.

This error can readily be avoided by amending the legal description in the Transfer which splits the parcel, then creating a subsequent mortgage through the "Create From" function in Teraview, or else manually amending the description in the "Properties" tab of the instrument, with the reason for change noted as "Affects Part of Property."

s. 118 Restrictions

Restrictions on future Transfers or Charges may registered under s. 118 of the *Land Titles Act,* allowing a specified person to block a future conveyance. The LRO will not police convoluted restrictions – a restriction that requires a person or corporation consent to a future Transfer will be accepted, but one imposing conditional or cascading consents in different contingencies will be returned.

Furthermore, s. 118 restrictions can be used only to restrict Transfers or Charges, not leases or other types of conveyances.

Cautions

Many Cautions are registered that are improper and will not be certified. Anyone seeking to register a Caution should refer to Bulletin 2000-02[14], but should bear two key principles in mind:

1. A Caution made under s. 71 of the Land Titles Act (other than the registration of an Agreement of Purchase and Sale) must be approved by the Director of Titles. Pre-approval is strongly recommended.
2. A Caution made under s. 128 must relate to a proprietary interest in the land, such as the cautioner having a right to receive a Transfer, Charge, or other conveyance. In the absence of such a right, the caution will not be certified.

Cautions remain active for just 60 days, after which they will be automatically deleted. Applicants must apply for a certificate of pending litigation within that 60-day window. Cautions may not be renewed, and permission to register a second caution is extremely rare.

Self-to-self Transfers

Date of birth: Self-to-self Transfers have been used by some practitioners to try to correct errors in date of birth and/or the address in the property description. Self-to-self Transfers for one or both purposes will be rejected. There is no "fix" for an incorrect municipal address, but errors in a date of birth can be amended by an Application (General).

Beneficial owner-to-trustee: Self-to-self Transfers solely for the purpose of converting capacity on title from a beneficial capacity to a trust capacity are not accepted for certification. S. 62 of the *Land Titles Act* prohibits the registration of a notice of a trust, and LRO staff consider a self-to-self Transfer of this sort to be an attempt at registering a notice of a trust.

Party names including "COB" or "O/A"

Registrations are often returned when a party's name includes a "COB…" or "O/A…" notation, followed by a trade or business name, after the legal name of the party. The party name must comprise the legal name only. Any trade or business name should be reserved for the address for service field. It is understood that this practice is particularly prevalent in construction lien registrations.

[14] https://files.ontario.ca/cautions_under_section_128_and_section_71_land_titles_act_2000-2.pdf