

# Tinkering with Title - Don't Get Caught by Surprise

Mining Bulletin

On December 2, 2015, Bill 155, the *Mining Amendment Act, 2015* (the "Bill 155") was introduced in the Ontario legislature for 1<sup>st</sup> Reading. Bill 155 proposes various housekeeping amendments to the current *Mining Act*, R.S.O. 1990, but most significantly proposes a new electronic mining lands administration system in Ontario, including an online registration system for mining claims. For readers interested in what a consolidated *Mining Act* would look like following the changes proposed by Bill 155, we have prepared a [blackline comparison](#). As stated clearly in the blackline version, **it is not an official version. It should not be relied upon and was prepared in order for readers to conveniently view the proposed Bill 155 amendments in the context of the current *Mining Act*.**

***New On-line Recording.*** The Ministry of Northern Development and Mines ("MNDM") must be commended for proposing to implement an online "map staking" system in Ontario, similar to those in many other jurisdictions, including other Canadian provinces, whereby ground staking of mining claims will no longer apply. However, Ontario's proposed transition mechanism differs from those of British Columbia and Quebec, where the existing claim fabric (defined as "legacy claims") could co-exist with the new on-line registered mining claims (defined as "cell claims") at the time of implementation (conversion from legacy claims to cell claims was voluntary). Under Bill 155, conversion of legacy claims to cell claims (or in some instances, boundary claims as discussed below) will be mandatory, raising concerns of adverse consequences to claimholders who fail to act diligently in advance of mandatory conversion.

***The Delineation Process: Existing Claim Posts No Longer Relevant.*** Bill 155 proposes a transition process whereby claim corners and boundaries will no longer be defined by ground posts but will, in future, be defined by UTM (universal transverse mercator) co-ordinates. According to proposed s.38.1, for the purpose of delineating a legacy claim on the provincial grid, the provincial mining recorder (the "recorder") shall use the information filed with the application to record the legacy claim as well as information gathered by means of inspections, Global Positioning System ("GPS") geo-referencing data, surveys or other means of verifying claim boundaries.

The recorder will have authority (ss.38.1(2)-(4)) to delineate claim boundaries, settle disputes between overlapping boundaries and make necessary adjustments. Pursuant to proposed s.38.1(5), from the date it is delineated by the recorder on the provincial grid until it is converted to a cell or boundary claim, a legacy claim applies with respect to the land included in the delineated area on the provincial grid, regardless of where the claim was actually located. Lastly, although most decisions of a recorder are appealable to the

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Mining and Lands Commissioner, a delineation decision made by a recorder will not be appealable.

Individuals knowledgeable with GPS equipment have already made the point that the GPS system MNDM has been recommending for general use may not be sufficiently accurate. Any claimholder concerned about the exact location of its legacy claims may wish to consider a higher level of GPS definition, or even a survey (especially in areas where a discovery has been made on its property).

***The Conversion Process: From Legacy Claims to Cell Claims and/or Boundary Claims.*** The following process is set out in proposed s.38.2 of the *Mining Act*. On a future “conversion date” (to be set by regulations), all delineated legacy claims will be converted to the new system. Proposed s.38.2(2) sets out various scenarios whereby a legacy claim will be converted to a cell claim or claims and, in some instances, to a boundary claim or claims. For legacy claims held by a single claimholder with no underlying agreements, the proposed process seems quite straight-forward. However, it gets more complicated in areas where either there are multiple legacy claimholders or a single legacy claimholder with contiguous legacy claims if such claims are subject to different underlying agreements.

*Multiple legacy claimholders:* Pursuant to proposed s.38.2(2).3, if immediately before the conversion date two or more delineated legacy claims are held by different claimholders and are part of the same cell on the provincial grid, then the cell will be called a “boundary cell”, and each portion of a former legacy claim will be converted to a separate “boundary claim” within that boundary cell.

*One legacy claimholder with multiple legacy claims:* Pursuant to proposed s.38.2(2).4, if immediately before the conversion date, a single claimholder has two or more delineated legacy claims included in a cell on the provincial grid, then the legacy claims, or portions of the legacy claims delineated in that cell, will merge into one cell claim. Title problems could arise with such a merger where there are underlying agreements applicable to the legacy claims (see the conversion scenarios below). Proposed s.38.2(7) provides that when there are agreements, liens, orders and other documents that *are recorded on* the abstract of a legacy claim or that otherwise purport to affect a legacy claim, such documents will continue in effect with respect to any cell claim (and, if applicable, any boundary claim) resulting from the delineation and conversion of the legacy claim.

To avoid such a merger, a claimholder with two or more legacy claims can make an election pursuant to proposed s.38.2(2).5 and s.38.2(3) to convert all or portions of each legacy claim to boundary claims. A cell which contains those two or more legacy claims (or portions) will become a boundary cell and each legacy claim (or portions) contained within such boundary cell will be converted to a separate boundary claim. (to better understand how this would work, see the sketch in Schedule “C” which is referred to in Scenario 2 below).

Prior to the coming into force of Bill 155, claimholders holding Ontario mining claims should take inventories of their legacy claims and of all agreements which apply to such claims and be satisfied that a merger as provided in the proposed legislation *will not* have unintended consequences. By allowing a merger, they could, for example, create title problems relating to underlying agreements, such as an encumbrance or royalty extending beyond the legacy claim’s original boundaries.

***Some Conversion Scenarios.*** Assume claimholder X holds a 100% interest in legacy

claims A, B and C and each legacy claim is subject to separate and different underlying agreements, involving different third parties with distinct rights. Specifically, legacy claim A is subject to a 3% net smelter returns royalty (“NSR”) with one party, legacy claim B is subject to a 3% NSR with a different party, and legacy claim C is subject to an earn-in option (an “Earn-In”) such that yet another different party can acquire 100% of legacy claim C. **Schedule “A”** (PDF) shows a sketch of the existing legacy claims. The scenarios below look specifically at the cell claim or potential boundary cell that could exist at the intersection of legacy claims A, B and C.

*Scenario 1:* a merged cell claim ABC is created for portions of claimholder X’s legacy claims A, B and C (see the sketch in **Schedule “B”**(PDF)). An obvious problem has been created -- all of the agreements which separately applied to each of legacy claims A, B and C may thereafter apply to the entirety of cell claim ABC (i.e. it may be subject to a 6% NSR in the aggregate and the Earn-In with 3 different parties depending on the terms of the underlying agreements (including the definition of “property” or similar definitions in the Earn-In which would need to be examined)).

*Scenario 2:* Claimholder X takes advantage of the election provision and sets up separate boundary claims A, B and C for each portion of legacy claims A, B and C within the boundary cell. (see the sketch in **Schedule “C”**(PDF)). The underlying agreements will continue to apply separately to each of boundary claims A, B and C. Significantly however, this means that the onus will be on claimholder X to firstly, determine if different agreements apply to each of the former legacy claims and to secondly, make the necessary election to request that separate boundary claims be created.

Providing title opinions and conducting due diligence on merged converted legacy claims in which underlying agreements are not properly identified, could ultimately result in uncertainty and disputes. It would seem that MNDM may be aware that its tinkering with mining claim title may result in problems. To protect MNDM from consequences of such uncertainty and disputes, proposed s.38.4(1) provides that no cause of action arises against the government as a direct or indirect result of: the delineation of a legacy claim, boundary adjustments made by a recorder, the conversion of a legacy claim into a cell claim or boundary claim, the entry on the abstract for cell claims of any agreements or other documents that are recorded on the abstract for the legacy claim, and more.

**Other Provisions.** In addition to the delineation and conversion issues, other provisions in Bill 155 deserve comment. In the current *Mining Act* there is no requirement for an agreement or document to be recorded on a mining claim abstract for it to be enforceable against the claimholder<sup>[1]</sup>. The current s.58 has provisions dealing with agreements entered into before and after the staking of a mining claim. In essence, a person is entitled to enforce an agreement regarding a mining claim if it is in writing and signed by the “*person against who it is sought to enforce the contract*” (in essence, the claimholder). Anyone who has conducted due diligence at the time of a financing of a project or the sale of a mining company or mining claims will understand that many agreements are retrieved (particularly option and royalty agreements) through minute book reviews and searching of corporate records. In many instances these agreements are not recorded on the abstracts for the mining claims. Yet they may be enforceable if they are original documents signed by an entity which continues to hold the mining claims (but in many cases, under a different name due a name change, take-over or merger).

The proposed s.38.2 may create uncertainties by linking enforceability to recording of agreements on the abstract of the mining claims. With the exception of section 61 of the

current Act, as referred to in the footnote, there is no such requirement in the existing *Mining Act*. As discussed earlier in this bulletin, Bill 155 provides that agreements **recorded** with respect to a legacy claim will continue in effect with the corresponding cell or boundary claim and that agreements continued in effect are enforceable only if they were enforceable before they were continued. Since proposed s.38.2(7) refers only to agreements which are recorded, what will be the status of agreements which are unrecorded and would have been enforceable under the current Act?

Bill 155 attempts to deal with this issue by including provisions similar to s.58 in the existing Act, whereby an agreement is enforceable if it was signed by the registered claimholder and is in writing. However, it would be preferable if these provisions had language clarifying that agreements, notwithstanding proposed s.38.2, do not have to be recorded to be enforceable.

Some help may be provided to existing legacy claimholders following conversion through the revisions to current s.7(4) and (4.1). In addition to the record keeping for the new mining claims registry system, the recorder's office will be obligated to maintain all records, maps, documents or information with respect to legacy claims in an electronic format which will be available to the public on the government website and at the recording office. However, it is unclear what the legal effect will be of these records for purposes of enforcing agreements against cell claims comprised of merged legacy claims.

**Assessment Work.** It is not clear in Bill 155 how assessment work requirements will be apportioned to new boundary claims so as not to make conversion to boundary claims more onerous than existing assessment work requirements (the potential problem being that if each boundary claim will have assessment requirements as if it were a full cell claim; then this could double or triple previous assessment requirements). Perhaps MNDM intends to clarify the process in regulations.

In conclusion, the changes proposed to the mineral title system in Bill 155 will be beneficial in that there will be time and money saved in acquiring, searching and dealing with title online at the click of button. However, these benefits are somewhat overshadowed by transitional issues that, in our judgment, do not appear to have been fully appreciated and dealt with in Bill 155. As a result, to avoid unintended consequences, claimholders could be left scrambling to complete comprehensive title reviews prior to the Bill's implementation. In some cases parties with unrecorded agreements relating to legacy claims could lose rights with respect to those claims and/or claimholders who unknowingly merge adjacent legacy claims into cell claims may be faced with competing interests from agreement holders. Accordingly, now is the time for claimholders to review their claim locations, title and agreements relating to title to make sure they are prepared for Bill 155, when implemented. Unfortunately, this could require financial resources they currently lack in a depressed market environment.

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[1] Except in the case of providing notice to subsequent purchasers. Section 61 of the current Act (essentially unchanged by Bill 155) provides that every instrument (other than a will affecting the claim or an interest therein) is void as against a subsequent purchaser or transferee for valuable consideration without actual notice unless the instrument is recorded in the mining claims registry before the recording of the instrument under which the subsequent purchaser or transferee claims. The analysis above is concerned about instruments being effective and enforceable against a claimholder who, although it may have gone through various name changes due to take-overs or mergers, continues to be the same legal entity that is holding the mining claim

since the time it entered into the relevant unrecorded agreement.

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