Doing Business on Metis Settlements in Alberta: The Legal Framework for Oil and Gas Activities on Metis Settlement Lands

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DOING BUSINESS ON METIS SETTLEMENTS IN ALBERTA:
The Legal Framework for Oil and Gas Activities on Metis Settlement Lands

For those who know a little about the political and economic history of Alberta over the recent past, know that the Province carries certain pride in addressing social and economic challenges with "made in Alberta" solutions. This approach, while not always successful, has tended to favour practical solutions over more theoretical debates concerning rights and interests. One area where you can find this uniquely Albertan approach applied with some degree of success is with regard to the self government ambitions of Metis peoples in Alberta. While Alberta is, admittedly, not always on the forefront of the evolution of aboriginal self government or the recognition of aboriginal rights, its approach towards Metis peoples can be seen as progressive. One example of this is the legislative regime governing Metis Settlements in the province, including the *Metis Settlements Act* (*MSA*).

Enacted in 1990, the *MSA* drew on the existing Metis settlements scheme and proposed a statutory framework which addressed the desire of Metis for legal recognition of their settlement land base and their corresponding desire for self government and control over that land base. For Alberta, the *MSA* and the funding commitments that accompanied its enactment, represented a stable solution to some of the historical claims and disputes with Metis peoples. It was a resolution which enabled the Metis to exercise a degree of control over the development of their settlement lands, while allowing Alberta to avoid a formal acknowledgement of any rights to the subsurface mineral interests on those lands.

Although not all Metis peoples or organizations in Alberta fall within the scope of the *MSA*, the legislation does recognize many of the objectives of Metis self-government. While the Act plays a significant part in the governance of the eight Metis Settlements in Alberta, it also plays an important role in determining how oil and gas activities are managed on settlement land. Most significantly, the effect of the legislation has been to provide Metis people with a voice in how oil and gas operations are conducted on settlement lands.

Under the legislation, the *MSA* formally recognizes eight Metis Settlements in Alberta: Gift Lake, Peavine, Fishing Lake, Buffalo Lake, Kikino, Elizabeth, East Prairie and Paddle Prairie. In total, the land base of the eight settlements is approximately 528,000 hectares. The legislation created a unique landholding system. Fee simple title to the settlement lands is held by letters patent granted by the Crown to the Metis Settlements General Council, a representative body comprised of councillors from all of the eight settlements. A special form of title, known as Metis title, is, in turn, held by each settlement's elected council and is capable of being transferred to individual settlement members. Interests in settlement lands, including those related to surface access for oil and gas operations are capable of registration under the Metis Settlements Land Registry. Non-settlement members are not permitted to hold Metis title to settlement lands, and can only receive permission to access or lease lands with the consent of the settlement council.

The Act also provides each settlement council with legal powers are similar to that of a municipal council. The elected Councils have the jurisdiction to pass bylaws in a host of different areas, including, health, waste management, land use planning and development,

business taxation, parks and recreation. With respect to oil and gas activities on settlement lands, councils, together with the Metis Settlements General Council, are empowered to enter into development agreements with oil and gas producers concerning the exploitation of subsurface resources.

In addition to the Metis Settlements General Council and the eight settlement councils, the *MSA* also established the Metis Settlements Appeal Tribunal, a quasi-judicial body empowered with the jurisdiction to resolve disputes between members, between members and the settlement and, in certain cases, disputes between non-members and settlements. While most of the work of MSAT involves matters of a local nature, it is also empowered by the *MSA* to resolve disputes over surface rights, including compensation payable by operators. In cases of surface rights, MSAT acts in a similar fashion to the Surface Rights Board and is guided by many of the same legal principles that are applied in that context. One critical distinction, however, arises from the express mandate of MSAT. The Act provides that the Tribunal's overriding consideration is to "exercise it powers with a view to preserving and enhancing Metis culture and identity and further the attainment of self-governance by Metis settlements under the laws of Alberta."

Metis Settlements and the Disposition of Mineral Interests

While title to settlement lands is held by the General Council, the subsurface mineral interests remain with the Provincial Crown. Despite the Crown's retention of the mineral interests, under the framework provided by a Co-Management Agreement (CMA) agreed between the Province and all eight Metis Settlements, the Crown is not free to dispose of those interests without the involvement of the Metis governing bodies. Under the process set out in the CMA, the Crown, in consultation with appointed Metis representatives, will issue a notice of public offering on terms requiring the bidder accept certain environmental, socio-cultural and economic conditions. Following the posting and receipt of bids, the successful bidder and the settlement council are notified and invited to enter into negotiations on the terms of a Master Development Agreement to govern the exploration and development of the mineral interests granted.

A successful bid does not, however, guarantee the bidder a licence or lease, only a right to negotiate a development agreement with the Settlement Council and the Metis Settlements General Council. If the parties are unable to reach agreement on the terms of an Master Development Agreement within a certain period of time, under the CMA, the Minister is notified of the rejection and bidder loses any entitlement to receive the mineral interests. The effect of this process is that the settlement and General Council retain what is essentially a veto over the granting of mineral interests beneath settlement lands.

To encourage the participation of Metis settlements in development of the resources, the provisions of the CMA provide that a Master Development Agreement can include terms and conditions entitling the General Council and the settlement to overriding royalties or participation options. It is also common for Master Development Agreements to contain provisions relating to economic development, specifically employment or contracting opportunities for settlement members or settlement contractors. Economic development has

become a primary concern of settlement councils, and in recent years greater emphasis is being placed on ensuring that the economic spin-offs from resource exploration and development flow back to the settlements. Because the cooperation of the settlement is critical to any activities on settlement lands, the management of those business opportunities, including the management of the expectations of the settlements, can be vitally important to fostering a stable working relationship.

Access to Settlement Lands

While the Master Development Agreement is intended to govern oil and gas activities for a mineral tenure, activities related to specific well sites and surface access also require the operator or producer to deal directly with a settlement council.

In most instances, the settlement council will require the operator to obtain a Project Licence which confirms that the activities are an "authorized project" for the purposes of the *MSA*. This is typically accompanied by two other documents: a Mineral Project Land Use Agreement and a Surface Access Agreement or Surface Lease. The access agreement addresses the compensation payable to the settlement and, where applicable, to any individual occupant. It is also common for the either or both of the access agreement and the Land Use Agreement to address environmental protection measures and other operator commitments, including obligation of the operator to extend contract or employment opportunities to Settlement members or settlement-based contractors.

In cases where the operator and the settlement council are unable to come to an agreement on surface access the operator can apply to either the Land Access Panel (LAP) or the Existing Leases Land Access Panel (ELLAP) for a right of entry order. Both Panels are appointed under MSAT and have a jurisdiction and powers which are similar to the Surface Rights Board. In cases where the mineral leases where granted prior to the *MSA* coming into force on November 1, 1991 the ELLAP has jurisdiction to determine right of entry and compensation. For those mineral interests granted after the enactment of the *MSA*, the LAP is provided the authority to decide matters of surface access.

Compensation for Surface Access – Cultural Impact

Like the Surface Rights Board, a key component of the powers held by the MSAT panels is the ability to assess compensation for surface access. The criteria to be considered by the Panels is found in section 118 of the MSA and contains similar factors to those found in the *Surface Rights Act (Alberta)*. Despite these common features, one of the critical distinctions under the *MSA* is the ability for an Access Panel to assess the potential impact of surface operations on Metis culture and "way of life". For example, section 118 includes criteria which allows the Tribunal to consider the value of the parcel of land in the context of its "cultural value for preserving a traditional Metis way of life." Moreover, a panel can also consider the impact of the project on other areas such as "disturbance to the physical, social and *cultural* environment."

Despite the unique statutory criteria provided by section 118, to date there have been few reported MSAT decisions which have specifically considered the monetary value to be attributed to potential impacts on Metis culture. The most frequently cited case is a 1996 MSAT decision in *Husky Oil Limited and Barrington Petroleum Limited v. Elizabeth Metis Settlement*, Order No. 1. In that case the Panel was asked to review compensation payable under a series of surface leases held by an existing mineral lease holder. The MSAT Panel determined that the settlement carried the onus to demonstrate that there were social and cultural impacts of the projects. While it noted that the settlement offered only anecdotal evidence on the impact the operations had on traditional Metis activities (specifically, hunting and trapping), it awarded to the settlement the amount of $800.00 per annum on each lease to address the potential for social and cultural impact. In its decision the MSAT Panel held open the possibility that a settlement could be entitled to greater compensation if they were able to more clearly demonstrate, through oral or written testimony, that the impact on the social or cultural environment was such that a greater amount of compensation was warranted.

Despite the invitation offered by the Panel in the *Husky Oil* decision, it appears that until very recently, the issue of compensation for cultural impact has not been back before MSAT. The absence of any comment on this issue from MSAT should soon change as a result of a recent compensation review application by the Gift Lake Metis Settlement involving a series of surface leases. Although MSAT is continuing its deliberations over the case, a decision in *Gift Lake Metis Settlement v. Devon Canada Corporation* is expected to squarely address the issue and provide some monetary measure of cultural impact. Among the other issues to be determined in that case, is the question of "retroactive" compensation and the degree to which MSAT can award compensation for the cumulative affects of oil and gas activities on Metis culture and traditional way of life.

While the result in the Gift Lake Metis review application is keenly anticipated, regardless of the outcome of that case, what has become apparent in recent years is that Metis Settlements and their elected Councils are now more keenly aware of the special status afforded to them under the *MSA*. While the provisions of the *MSA* as they relate to oil and gas activities share some common features with the conventional surface rights regime, ignoring the distinctive features of the Act, and the self government powers provided to Metis Settlements is certain to invite long term problems for any oil and gas producer who wishes to carry out activities on settlement lands.

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