

CONSTRUCTING A LEGAL LAND SYSTEM THAT SUPPORTS ECONOMIC DEVELOPMENT FOR THE METIS IN ALBERTA

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INTRODUCTION

On November 1, 1990, the Metis Settlements Legislation, composed of the *Constitution of Alberta Amendment Act*, the *Metis Settlements Land Protection Act*, the *Metis Settlements Accord Implementation Act*, and the *Metis Settlements Act (MSA)*,¹ was passed implementing Canada's most comprehensive legal regime for dealing with Metis land and rights claims. Given the history of the Metis as being landless, and impoverished, it will be argued that the Metis Settlements legislation, particularly the *MSA*, is a unique response to Metis' land and rights claim, and that they provide a framework that promotes and supports economic development for the Metis Settlements. In the first section of this essay, an overview of the different definitions of who the Metis are will be explored. Following this will be an overview of the legal history leading up to the enactment of the Metis Legislation which will identify some of the pri-

mary concerns in constructing a legal framework that supports economic development and self-governance. Next will be a description of the structure of the Settlements under the *MSA*. The three sections following that, will compare the relevant provisions of the Metis Settlements legislation with provincial legislation with respect to the land titles system, surface rights regime, and sub-surface *Co-Management Agreement*,² in order to demonstrate the ways in which the Metis Settlements legislation protect Metis land, culture, and rights, while promoting and facilitating economic development on the Settlements. Finally, there will be a brief conclusion.

THE METIS — DEFINITIONS

Historically, definitions of the Metis people arose out of the fur trade era. The Metis' origins are traced to marriages between Indian women and European fur traders. Originally, the children of

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these marriages tended to be absorbed into the mother's culture (Indian culture), however, later children of these marriages saw themselves as distinct and separate from both European culture and Indian culture. At this time, the Metis were generally referred to as "half breeds" or "mixed blood" reflecting their dual ancestry.

The Courts and Governments have also attempted to formulate "legal" definitions of Metis. In *Powley*,³ the Court recognized that there is no universally accepted definition of the Metis, so they offered the broad definition that "a Metis is a person of Aboriginal ancestry, who self identifies as a Metis and who is accepted by the Metis community as a Metis." In the same decision, the Court also outlined an objective two-part test to determine who is a Metis within the meaning of s. 35(2) of *The Constitution Act, 1982*.⁴ The first part involves self identification as a Metis and acceptance into contemporary Metis society. The second part involves demonstrating a genealogical connection between the individual and historically identified Metis society.

The Federal Government, in the Charlottetown Accord referred to two definitions in association with the Metis Nation. Metis Nation refers to descendants of the Red River Metis who received land under the Scrip System, while 'other Metis' was used to refer to self identifying Metis populations not connected with the Metis National Council.⁵ The Royal Commission on Aboriginal Peoples also addressed the issue of Metis identity, focusing on self identification and culture as the defining characteristics of the Metis. Thus to summarize, the most common definitions of the Metis are:

1. Anyone of mixed Indian/non-Indian blood who is not a Status Indian
2. A person who identifies as Metis and is accepted by a successor community of the Metis Nation
3. A person who identifies as Metis and is accepted by a self-identifying Metis Community
4. Persons who took or were entitled to take half-breed grants under the *Manitoba Act* or *Dominion Lands Act* and their descendants
5. Descendants of persons excluded from the Indian Act regime by virtue of a way of life criterion.⁶

Finally, the *MSA* also deals with Metis identification with respect to membership in the

Settlements. For the purposes of the Metis Settlements Act, criteria for membership is generally left to the individual Settlement Councils, subject to the terms set out in ss. 74–98 of the *MSA*. In order to prove Metis identity under the *MSA*, the person must have Canadian Aboriginal Ancestry and identify with Metis history and culture. Further criteria required in order to apply for membership to a settlement are set out in ss. 74–75.

For the purposes of this paper, the Metis as discussed will refer to those who are members of a settlement or eligible to be members of a settlement.

METIS HISTORY IN ALBERTA

Early 20th Century

In contrast to the Indians, who had legally acquired a land base through the various treaties and who were under the responsibility of the federal government, the Metis situation was different and worse. Many of the Metis had been defrauded or swindled out of their scrip land or had taken money scrip instead, thus the Metis generally lacked a land base. In Alberta, the Metis in the central and north-central region were faced with a scarcity of game for hunting and trapping, and furthermore, required licenses because they were subject to the laws of general application of the province.⁷ As a result, their condition was generally one of severe poverty.

Ewing Commission — 1934–1936

In response to the deplorable condition in which the Metis were living, a Royal Commission led by A. F. Ewing put forth some recommendations based on the findings of its investigations. The main concerns of the Commission were to address the landlessness, poverty, under education and poor health of much of the Metis population in central and north central Alberta.⁸ In addressing these concerns, the Commission was influenced by four main assumptions that led them to focus on perceived social needs rather than legal rights. These assumptions were:

1. Metis claims to Indian title had been extinguished through the scrip distribution system
2. Metis and non-status Indians were the responsibility of the Province

3. The Metis of Northern Alberta were asserting *needs* — not rights
4. The response would need to involve land allocation⁹

Based on these assumptions, the Commissioners formulated three (3) guidelines on which to base their recommendations. The first was that the solution should be a comprehensive scheme rather than just providing temporary relief. Secondly, given economic conditions at the time, the solution should be relatively inexpensive to implement. Thirdly, they did not want to deal with the Metis' situation in the same way as the Federal Government dealt with Indians because it would be too expensive, impede initiative and be perceived to acknowledge Metis rights.

In terms of the administration of these 'colonies' and the legal rights of the members of the colonies, it was recommended that the land be allotted for the use and occupation by the Metis, but with title and other ownership rights remaining with the Crown, implicit in this right of use and occupancy was a right to hunt, trap and fish. In addition, day-to-day management would be the responsibility of supervisors appointed by the Government with final authority and control over the colonies residing in a Government department. The members of the colonies would be able to elect councils, but these would have advisory powers only. Thus essentially the Metis were to be given rights of use and occupation and a land base.

Metis Betterment Act

The recommendations of the Ewing Commission resulted in the promulgation of the *Metis Population Betterment Act*¹⁰ (subsequently called the *Metis Betterment Act*) in 1938. In the Act, Metis was defined as a person of mixed white and Indian blood, excluding non-status Indians as defined in the Indian Act. A joint Metis/Government committee selected the lands to be set aside for settlement. Under the 1938 Act, responsibility for economic and social development was given to a Minister of the Crown, although it was envisioned that the Minister and the Settlements would work cooperatively in the formulation of programs for the betterment of the Metis.

To this end, the formation of Settlement Associations was provided for and they were

given the authority to make constitutions outlining conditions for membership, elections, board meetings and other management provisions, including limited by-law making powers. However, the settlement constitutions were subject to ministerial approval.¹¹ The Act also provided that any scheme formulated pursuant to it was subject to approval by the Lieutenant Governor in council (cabinet) and additionally, that cabinet had the authority to set aside unoccupied provincial lands for Metis Associations "until such time as it is satisfied that for any reason whatsoever, the lands so set aside ... are unsuitable or are not required for settlement of any members."¹²

In 1940 and 1952, significant amendments were made to the Act. One of the most significant changes was the omission of reference to the "*conferences and negotiations between the Government of the Province and the Metis population*" signaling a retreat from program formulation based on informal cooperative schemes.¹³ This was replaced by a focus on administration through government regulations, which granted broad legal powers over decisions to the Lieutenant Governor-in-Council, to the Minister with the approval of the cabinet or to the Minister alone. This included a provision granting the Minister to make regulations regarding any matter not specifically addressed in the Act, which have, for their purpose, the advancement and betterment of administration of any Settlement Association, its members, or its land.¹⁴

In addition, the 1940 amendments also modified the definition of Metis to a person with a minimum of one quarter Indian blood. The result of these amendments was the increased subjection of the settlements to ministerial and bureaucratic control and the removal of the consultative and cooperative role of the Settlement Associations.

In terms of finances, the amendments and regulations had both positive and negative effects. Settlement members were exempt from land taxes, (although the Minister could establish other taxes) and real and personal property (except for those sold under a valid conditional sales agreement) were exempt from seizure. On the one hand, this provided extra protection to Settlement Members regarding seizure of property, however, it had the effect of making lenders more reluctant to enter into loan agreements with Settlement members.

Finally, under the *Metis Betterment Act*, the Provincial Government retained the right to uni-

laterally repossess settlement lands that were no longer deemed suitable or required for the purposes of The Act. Thus in the 1960s, the Government closed down four settlements removing them from the Settlement regime (Touchwood, Marlboro, Cold lake and Wolf Lake). While only Wolf Lake was inhabited, it was shut down despite petitions by its residents.¹⁵ This event highlights the fragility of the security of the Metis' landbase.

MacEwan Committee and Resolution 18

The problems inherent in the *Metis Betterment Act* led to a Provincial Task Force and later to the MacEwan Committee which made the recommendation leading to the Metis Settlements Act. Generally the main concerns of the Metis Settlement Association can be separated into three (3) main categories—too much Government control over the administration and development of settlement lands; lack of Metis control over economic development and the administration of resource trust funds; a need for more than just a right of use and occupancy of Settlement lands.¹⁶

It is important to note that the MacEwan Committee's work coincided with natural resource litigation involving the Metis and the Provincial Government. This litigation focused on the Metis population Trust account, in which the revenue of the trust account was to be acquired from sources such as timber dues, grazing permits, surface rights, compensation from oil companies and "*all monies received from the sale or lease of any other natural resources of the [Settlement] areas.*"¹⁷ This last phrase was interpreted by the Settlements as meaning that the trust account should receive the revenues derived from the sale or lease of subsurface, as well as surface natural resources. The Provincial Government, on the other hand, argued that subsurface rights (mines and minerals) remained with the Crown and thus the Crown was entitled to the revenues. The financial stakes in this litigation represented hundred of millions or even billions of dollars of possible liability on the Provincial Crown. Thus reaching an out-of-court solution was a very attractive alternative for The Provincial Government.

The MacEwan Committee undertook its recommendations with the following principles in mind:

1. The Metis represent a unique cultural group in Canada, as aboriginal people recognized in the Constitution and a group that played an important role in the development of Western Canada.
2. Because the culture and lifestyle of the Metis Settlement is inextricably linked to the land, a Metis Settlement land base is the cornerstone on which to build and maintain the social, cultural and economic strength of the Metis settlers.
3. Given a unique culture and land base of the Metis Settlement Areas, the Metis can best achieve the mutual goal of self reliant integration without home organization, by a legislative framework enabling the maximum practicable local self government of the land base.
4. It would not be practical to include in Metis Settlement local Government the full scope of powers to deal with matters such as health, education, social services and economic development, but even in these cases, the uniqueness of the culture and its problem solving traditions should be respected by Government bodies exercising the power.¹⁸

In addition, the Committee recognized some problems that would have to be addressed including; the security of the land base because the Government could repeal the legislation unless the right to the land was constitutionally recognized; and arrangements to address the financing of self government initiatives were necessary.¹⁹

Following the recommendations of the MacEwan Committee, a new set of negotiations began between the Metis and the Provincial Government. This led to Resolution 18 in which the Provincial Government agreed to give the Metis constitutional protection of their land base provided that the settlements developed fair and democratic procedures for membership and land allocations. Further negotiations followed in which two bills regarding Metis Settlements Legislation would be introduced in the Legislature, however, the Government also linked the fulfilment of Resolution 18 to a settlement of the trust fund litigation. While the bills were never passed, negotiations continued and an agreement was finally reached in early 1989, which would see the Metis drop the lawsuit and receive \$310 Million over a seventeen-year period to support governance and operation of the Settlements.

After a Referendum on the Agreement was passed in June of 1989, four Bills (33, 34, 35 and 36) were introduced into the Legislature resulting in the enactment of the Metis Settlement Accord Implementation Act, Metis Settlements Land Protection Act, Metis Settlements Act and The constitution of Alberta Amendment Act, in 1990.²⁰

The structure of the Settlements under the Metis Settlements Act (see Appendix A)

The Metis Settlements Legislation applies to eight (8) settlements: Paddle Prairie, Peavine, Gift Lake, East Prairie, Buffalo Lake, Elizabeth, Kikino and Fishing Lake — which encompass a total area of approximately 1.25 million acres. Each settlement has been established as a corporation and thus has the rights, powers and privileges of a natural person subject to a limited number of financial activities which require ministerial regulation or authorization by settlement councils or the General Council. The organizational structure of the Metis settlements is as follows (see Appendix A).

□ METIS GENERAL COUNCIL
(GENERAL COUNCIL)

The General Council is composed of four elected officers and the settlement councilors. The General Council's primary focus is on enacting policies affecting the collective interests of the settlements under ss. 222–226. The General Council has the authority to make policies regarding a wide range of subjects including regulations and interests in timber, co-management of subsurface resources, rights and interests in patented land, assessments and taxation related to land, regulations of hunting, trapping, gathering and fishing. In addition, the General Council may engage in commercial activities, lend money and guarantee loans by a lender to someone other than a settlement member. All General Council policies, after being passed by unanimous resolution (requiring approval by all 8 Settlements), or special resolution if applicable, must then be submitted to the minister for approval. The minister has a power of veto over General Council policies or portions of them. If the minister does not use this power, then the policy becomes binding on the General Council and all Settlement Councils.

Below the General Council, are the eight Settlement Councils. As with the General Coun-

cil, the Settlement Councils are corporate bodies with the rights and privileges of a natural person. The Settlement Council's are elected by the members of the settlement. Generally, the Settlement Councils powers are analogous to those of a municipality. The Settlement Councils may pass by-laws relating to things such as: residency on the settlement; promotion of health safety and welfare of residents; parks and recreation; waste disposal; by-laws to control and regulate businesses and industries in the settlement area; and by-laws to implement General Council policies.

Next in the organizational structure are the individual settlement members. Settlement members must meet the membership criteria set out in the General Council policy and settlement by-laws (i.e. Metis identity, residency).

The Metis settlements also have their own dispute resolution mechanism — The Metis Settlements Appeal Tribunal (MSAT). Technically, the MSAT is an administrative tribunal, however, it's role in "fleshing-out the legislated framework makes it more analogous to a 'Metis court'."²¹ The purpose of the MSAT is to resolve disputes arising from the legislation. The MSAT is composed of seven people including a chair appointed by the minister from a list provided by the General Council, three members appointed by the General Council and three appointed by the Minister. These are two other panels created under the *MSA* — the Land Access Panel (LAP) and the Existing Leases and Land Access Panel (ELLAP), which exercise jurisdiction in areas formerly exercised by the Provincial Surface Rights Board. Disputes that arise from the *MSA*, General Council policy or settlement by-laws are handled by the MSAT or the two land panels provided that the parties involved agree to submit to their jurisdiction. Appeals of the tribunal or panel's decisions on questions of law or jurisdiction may be made to the Alberta Court of Appeal.²²

Land Title/Metis Title (see Appendix B)

The *MSA* creates a unique system of interests in land through the Metis title system. Under the *Metis Settlements Land Protection Act (MSLPA)* the settlement lands are granted, through letters patent, to the General Council in fee simple title with all of the traditional ownership rights and obligations associated with fee simple title, subject to the exceptions set out in

the *MSLPA* and the reservations of the Crown. Under the *MSLPA*, the fee simple estate in any of the patented lands may not be alienated without the consent of the settlement councils, a majority of settlement members and the Crown. Also, the patented lands cannot be used as security. In terms of Crown reservations, the Crown retains title to mines and minerals (as defined in *The Mines and Minerals Act*), as well as water, fixtures, Crown improvements and archeological resources and interests acquired prior to the granting of the lands to the General Council. The Crown also reserves specific user rights such as diversion of water, access to Crown fixtures, the right to manage highways, etc. An important protection for the settlements exists under the *MSLPA* which prevents the Crown from expropriating any of the patented without the consent of the General Council. Furthermore, the General Council's title to the land is constitutionally protected under the *Constitution of Alberta Amendment Act*. Thus the Metis need for a protected permanent land base has been achieved under Metis Settlements Legislation.

□ METIS TITLE

The General Council has the authority to grant land to the Settlement Councils and Settlement members. The Settlement Councils and members receive Metis title under s. 2.4 of *The Metis Settlements General Council Land Policy*. Metis title is similar to conditional Fee Simple title, and includes the exclusive right to:

- (a) Use and occupancy
- (b) Make improvements
- (c) Transfer Metis title
- (d) To grant lesser interests
- (e) To determine who receives Metis title on the holder's death²³

In addition, the holder of Metis title has any additional rights that are specifically provided for by General Council Policy or any other enactment. The conditions attached to Metis title relate to things such as acquisition and disposition and include: meeting settlement membership requirements; limits on the amount of land allowed to be held under Metis title; and that the creation of lesser interests must be approved by the Settlement Council. It is important to point out that there are some very significant differences that distinguish Metis title from a conditional Fee Simple. For example, the *Wills Act* does not apply to Metis title and it

appears that *The Ultimate Heir Act* (under which in the absence of an heir, title Aescheats' back to the Crown) is also not applicable because title would likely go back to the Settlement Council or the General Council. Furthermore, the Provincial *Land Titles Act* does not apply and under the *MSA*, as a Metis Land Registry System is provided for. These factors make Metis title a unique interest in land that is distinguishable from traditional conditional fee simple estates.

□ PROVISIONAL METIS TITLE

Under s. 2.5 of *The Land Policy*, the Settlement Council can grant a member provisional Metis title in settlement land to enable the member to use the land and make improvements to the extent needed to obtain Metis title.²⁴ In order for a settlement council to grant provisional Metis title, it must hold the land in Metis title. In order to hold provisional Metis title, the member or settlement must complete a memorandum which includes: the conditions to be met, including improvements to the land, that will give the holder the right to acquire Metis title; The amount of time in which the holder has to meet the conditioning; and the rights and duties of the holder with respect to the land. Thus provisional Metis title generally grants a right of exclusive use and occupation of the land for a fixed period. This is similar to a fixed term lease which grants exclusive possession to the Tenant for a fixed period with a reversionary interest remaining in the landlord.

□ ALLOTMENTS

Allotments are similar to provisional Metis title in that they grant land to a member for a fixed period of time. However, the purpose of the allotment is to allow a member to use more land than can be acquired under Metis title. Thus under s. 2.6(1) of *The Land Policy*, allotments can be granted to member to operate a farm, ranch or business.

The Metis system of land title is unique because it creates interests similar to those under the common law, but with distinct features (as under Metis title) that allow the collective interests of the settlement to be balanced with those of the individual members. Also, the constitutional recognition of the Fee Simple title held by the General Council finally gives the Metis settlements a secure land base.

□ METIS LAND REGISTRY SYSTEM

Under the *MSA* regime, the Alberta *Land Titles Act* does not apply to the settlements. In its place is the Metis Settlement Land Registry. The Registry is based on the same purposes as the Torrens Land Titles System — to confer title; provide security of ownership; facilitate the transfer of interests in land and establish a system of interest priorities.²⁵ As with the Torrens system, the Land Registry also makes a distinction between recording of interests and registering of interests. The effect of recording an interest is to give priority in relation to other recorded interests. Registration confers both priority and ownership regardless of whether this would be recognized at common law. Under the Land Registry there are three categories of registers:

1. Fee Simple — This registry deals with the land granted in fee simple to the General Council
2. Metis Title — This registry deals with each parcel of land held by way of Metis title (*settlement's title and individual members*)
3. Interests Registers — These deal with other interests in land, i.e. provisional Metis title, allotments, leases, etc.²⁶

In this sense, the Land Registry is unique from the Land Titles system by recognizing the different types of interests in settlement lands. Another unique aspect of The Land Registry is the process for the resolution of disputes. Under Part 7 of the Registry Regulation, an aggrieved person or the Registrar can apply to the MSAT or The Court of Queen's Bench for the resolution of disputes.²⁷ If a dispute goes before the Tribunal, the Tribunal can issue an order directing the Registrar to record on interest or cancel a recording as well as correcting the register. Normally an order that cancels or terminates interests will only be registered if it is consorted to by the parties, was granted *ex parte* and need not be served or is accompanied by an undertaking that an appeal will not be sought. The significance of this power of the Tribunal is that this power normally falls within the jurisdiction of the Court of Queen's Bench. Thus by allowing the Tribunal to exercise jurisdiction in this area, decisions can be made by persons more knowledgeable about the Metis Land Registry System. Finally, it is important to note that under the Registry Regulations, non-members cannot be

granted an interest in settlement lands that allows them to live on the settlement unless allowed by General Council policy or a settlement by-law.

Another important aspect of The Land Registry System relates to the application of other sources of law to the rights and interests in settlement lands. Under s. 99 of the *MSA*, the Common Law is not expressly recognized as being applicable. The advantage of this is that it can allow for a degree of flexibility and can ensure that the *MSA*, General Council policy and settlement by-laws remain the primary authority, especially with respect to the unique interests under Metis title. However, it should be noted that since the Common Law is not expressly excluded, it can be applied in resolving disputes or for interpretation.

In terms of the application of principles of equity (principles that address the harshness and unfairness of some Common Law results), these are generally enforceable since they are not expressly excluded. However, since equity is discretionary and flexible, these principles can be used in disputes heard by the MSAT to ensure that the interests of the settlements and members are protected and thus equity can be beneficial.

Under s. 222 of The *MSA*, absent express statutory authority to exclude the application of provincial laws, General Council policy and settlement by-laws that are inconsistent or conflict with provincial law are of no force or effect to the extent of the inconsistency. For example, under s. 222(1)(V), the *Estates Act*, *Real Property Act*, *Wills Act*, *Dower Act*, *Intestate Succession Act* and *Ultimate Heir Act*, are expressly excluded from application to the settlements and, the General Council and Settlements have been given authority over trapping, hunting, fishing and gathering.

The Metis Settlements Land Registry is based on the provincial *Land Titles Act*, even incorporating some of its provisions. This is necessary to provide a degree of certainty for non-settlement members dealing with interests in settlement land. However, the Land Registry is unique because it recognizes the different forms of Metis title and allows for the MSAT to resolve disputes arising from the operation of the system. Furthermore, the Land Registry is closely modeled on the Model Land Recording and Registration Act which was proposed in 1990 to all the provinces. The Model Act sought to

remove many of the uncertainties and anomalies of the Torrens System (relating to issues such as fraud, notice and a large number of overriding interests).²⁸ Thus in some respects, the Metis Land Registry is based on a model that improves upon the current Torrens system.

□ *MSA SURFACE RIGHTS REGIME
VS. SURFACE RIGHTS ACT
(SEE APPENDIX C)*

A comparison and analysis of the Provincial *Surface Rights Act*²⁹ and the regime under the *MSA* can be used to demonstrate the uniqueness of the latter in facilitating economic development while simultaneously protecting Metis culture and society.

Under s. 12 of the *Surface Rights Act*, an operator has no right of entry until they have either obtained the consent of the owner/occupier of the land or a right of entry order (REO) from the Surface Rights Board (the Board). Thus in the provincial scheme, the issue of consent for entry is between the individual owner or occupier of the land and the operator. By contrast, under s. 114 *MSA*, the operator cannot enter without the permission of The General Council, the Settlement Council and the individual settlement member. Thus this provision ensures that there will be some communication between the General Council, Settlement Council and the member and that the rights and interests of each will be considered and that the giving or withholding of consent will reflect the balancing of the collective interests of the settlements with the interests of the individual. Furthermore, if an agreement is reached between the operator and the councils and member involved, compensation for the settlement is paid directly to the settlement thus facilitating the accounting and use of the revenues for the settlement. A typical surface lease agreement on the settlements divides the compensation as follows: the settlement member receives 80% of the initial payment with the settlement receiving 20%, then the settlement receives 80% of annual payments and the settlement member receives 20%.³⁰

If an agreement cannot be reached between the parties, then the operator can apply for an REO under ss. 115 and 116, the ELLAP and LAP have jurisdiction for granting REO's (previously the Surface Rights Board had this authority), depending on whether it relates to an existing lease (then it goes to the ELLAP) or a new lease (goes to LAP). In addition, the LAP

has been given the authority to amend a compensation order or REO if there has been a change of the existing mineral leaseholder or operator, or if there is a new occupant to whom compensation should be paid. Further, the LAP can also terminate an REO if it is not being used or *there is a good reason to terminate or amend the order*. This power to amend or terminate an REO if a good reason can be shown, allows the LAP to ensure that the interests of the settlement and the land are being protected. For example, in the *Husky Oil Ltd. and Barrington Petroleum Limited and Elizabeth Metis Settlement Order of The LAP*,³¹ the LAP amended an existing surface lease to reflect the new interest holders (new oil company and settlement) and also increased the compensation to be paid because of the impact on the surrounding area. Thus the LAP was able to use its jurisdiction to attain compensation for the impact on the social and cultural environment on behalf of the settlement.

This raises another very important distinction between the Surface Rights regime and the *MSA* are the process and factors to be considered in deciding whether to grant an REO and the amount of compensation. In terms of process, under the *SRA*, if an agreement cannot be reached between the owner/occupier and the operator, then the operator can apply to the Board which can issue an REO. If there is an objection to the Order, then the Board may hold a hearing and then make a decision either granting or not granting the Order. Under the *MSA* (s. 115) upon receiving an application for an REO, the ELLAP/LAP may: direct the parties to negotiate and provide them with assistance; inquire into the matter further and request information from any other person or agency it considers necessary; and establish any means of making a reasonable decision including requiring the parties to submit their final offer. If this does not resolve the issue then the Panel can adjudicate the dispute. Thus this process includes negotiation and consultation between the parties with the assistance of the Panel as an alternative to adjudicating the dispute.

If the Panel ends up adjudicating the dispute, of special importance are the factors which the Panel determines compensation. Under s. 25 in the *Surface Rights Act*, the factors that the Board is to consider include the market value of the land; loss of use of the land; adverse effects on the rest of the owner's land, damage to the

land; and other factors the Board considers appropriate. Under s. 118 of the *MSA*, in determining compensation, the Panel may consider the value of the land *including the cultural value for preserving a traditional Metis way of life*, as well as disturbance to the *physical, social and cultural environment*. These factors are in addition to the economic criteria used in the *Surface Rights Act*. The LAP has considered the meaning of “cultural value for preserving a traditional Metis way of life” and the “cultural” environment, again in the *Husky Oil Ltd. and Elizabeth Metis Settlement* decision. In that case, the General Council and Settlement argued that the cumulative effect of oil and gas activities had a negative effect on hunting and trapping and that apart from the economic loss, there is a direct correlation between the diminishment of hunting opportunities and the diminishment of Metis culture, because hunting and trapping is an inherent and vital part of Metis culture.³² The Panel agreed with this argument and set out a test to use for determining the compensation for impact on the social and cultural environment and on preserving a traditional Metis way of life. The test can be summarized as follows:

1. The settlement must persuade the Panel that the activity or cultural value is an inherent and vital part of Metis culture
2. That the operator's activity has an impact on Metis culture. This can be direct or indirect (in this case oil and gas activity affected the surrounding environment, which in turn affects hunting and trapping which is dependent on the environment).
3. Once 1 and 2 are established, the Panel will be prepared to order a minimum amount of compensation (in this case, it was \$800/annum)
4. If the occupants wish to receive compensation above the minimum amount, they must prove, through oral or written testimony, that the impact is such that greater compensation is warranted.

Thus following this test, once the occupants have shown that the operator's activity has any impact on something which is an inherent and vital part of Metis culture, the occupants are automatically entitled to a base level of compensation. If they can prove a more substantial impact, then the compensation will be higher. It should be noted that in the decision, it was pointed out that the majority of operators have

readily accepted the settlement's firm position on this point, to the extent that it is becoming an industry standard.

Thus in comparison to the *Surface Rights Act*, the *MSA* surface rights regime accomplishes three important goals: First, an operator needs consent of the General Council, settlement council and occupant thus ensuring that both the collective interests of the settlement and the individual interests of the member are recognized and considered. Secondly, the jurisdiction of the ELLAP/LAP over surface rights and the process that is used encourages and facilitates a non-adjudicative resolution of disputes and allows for the representation of Metis interests on the Panel. Finally, in receiving compensation under an REO, the unique culture and value of the Metis is recognized and considered an important factor in determining compensation.

□ *MINES AND MINERALS ACT VS.
CO-MANAGEMENT AGREEMENT
(SEE APPENDIX D)*

Schedule 3 of the *MSA* is the *Co-Management Agreement* between the Crown and the Settlements. The Agreement essentially governs the management of subsurface natural resources. Under Alberta Legislation, mines and minerals are dealt with under the *Mines and Minerals Act*. The *Co-Management Agreement* provides for a much greater role for the Metis in dealing with subsurface resources. The uniqueness and benefits will be demonstrated by comparing the *Mines and Minerals Act* with the *Co-Management Agreement*.

As mentioned earlier, title to all subsurface mines and minerals is vested in the Crown under s. 9 of the *Mines and Minerals Act*. The Minister, acting on behalf of the Crown, is given authority to enter into contracts or otherwise dispose of, or develop, subsurface minerals, as well as to contract or make agreements regarding royalties, and any other matter that the Minister considers to be necessarily incidental to any of these above-mentioned matters. Thus in negotiating agreements regarding the development of subsurface resources, the only parties involved are the Minister and the Bidders.

In contrast, under ss. 201, 202 of The *Co-Management Agreement*, a Metis Settlement Access Committee (MSAC) is to be appointed for each Settlement. The MSAC is composed of five (5) members—1 appointed by the Minister; 1 appointed by the Energy Resources Conserva-

tion Board; 1 appointed by the Settlement; 1 by the General Crow and 1 by the Commissioner or by mutual agreement. The MSAC plays an important role in the bidding process and ensures that the Settlement's interests are considered and protected. ss. 301, 302, 306–310 of the *Co-Management Agreement* outline the bidding process which generally works in the following way:

1. The Minister, on recommendation of The Mineral Disposition Review Committee to publicly offer rights in minerals, refers a posting request to the affected MSAC.
2. Within 42 days, the MSAC must either recommend that the posting request be denied or that the minerals be posted. In addition, the MSAC can include any special terms or conditions (discussed below) that it wants included in the posting.
3. If the MSAC recommends a posting, then the Minister prepares a Notice of Public Officer (NPO) and delivers it to the affected MSAC for approval. The MSAC then either approves or disapproves of the proposed terms. If the MSAC disapproves, then the Minister either decides not to post the minerals or to amend the terms and re-submits it to the MSAC for approval. This process repeats either until an agreement is reached or the Minister decides not to post the Minerals.
4. If agreement between the Minister and the MSAC is reached, then the General Council and the affected Settlement can have a representative consult with potential bidders.
5. The Minister then gives the General Council and affected Settlement the name of the best bidder, whom they negotiate with. Then the General Council and Settlement notify the Minister that either the bid should be rejected or that a development agreement has been reached. This process continues until an agreement is reached with one of the bidders, there are no more bidders, or the Minister stops submitting bids.

Thus in this process, the MSAC plays a vital role in determining the terms and condition of an offering of minerals rights. The Minister does have the authority to post the minerals even if the MSAC recommended against it, however, the Minister must give notice to potential bidders

that the disposition of the minerals does not grant access to the land. Thus the successful bidder would have to follow the Surface access procedure set out in the *MSA*. This unique process of disposing of minerals on Settlement lands thus ensures that the Settlement and General Council interests are represented in the bidding process and that no extraction of minerals can occur without Metis government consent.

Under ss. 35, 36 of the *Mines and Minerals Act*, royalties and other revenues are reserved to the Crown, as are any other special conditions of the disposition. However, under the *Co-Management Agreement*, the Settlement is entitled to a share of revenues and can impose special conditions in the NPO under s. 303, the MSAC can recommend terms and conditions concerning the environmental, *socio-cultural*, and land use impacts, as well as employment and business opportunities and conditions concerning the reservation, and also reservations to the General Council of overriding royalties, participation option, or both, with respect to the development of the minerals. *Socio-cultural* has not yet been specifically defined, but it appears that it would likely be given an interpretation similar to 'cultural value' and 'cultural environment' under the surface rights regime.

In terms of 'overriding royalties' and 'participation options,' these are defined in the *Co-Management Agreement*. Overriding royalty is a right reserved in a development agreement to the General Council, for it to receive a share of the portion of production, or the value of it, that remains after the royalty payments to the Minister are made. The 'participation option' refers to an option reserved to the General Council that allows it to maintain not more than a 25% specified undivided interest in the resource agreements referred to in the development agreement.

The effect of the *Co-Management Agreement* on economic development has been very positive and very substantial. The General Council has been able to establish a settlement owned oil and gas company, Resco Oil and Gas Ltd., which exercises the General Council's participation rights under the agreement. Currently, it works as a royalty or working interest partner in over 100 oil and gas wells located on settlement lands.³³ Other employment and business opportunities for settlements and settlement members have also developed. For example, the Buffalo Lake Settlement has established the Buffalo

Lake Cats company which employs settlement members in its site preparation, road construction, and clean up operations.³⁴ Thus the Co-Management scheme provides the Settlements with a source of revenue as well as employment and business opportunities, all while enabling Metis culture to be preserved.

The General Council also recently passed the Mineral Projects Policy (1996).³⁵ Under Part 2 of the policy, the General Council has authority for: adopting standard posting terms; deciding on the types of fees, royalties, levies, etc. for different types of projects; determining the standard forms and procedures to be used by all Settlements in enabling projects; and representing the collective interests of the Settlements, including those of the General Council, in discussions and agreements with other governments. At the same time, the General Council can only act on matters for these 'united actions' through special resolutions which require the approval of at least 6 Settlement Councils. Thus this allows for greater certainty and fairness for both the different Settlements and non-member companies involved in resource development. In addition, under Part 4, all projects on Settlement land must have a license approved by the Settlement Council which is authorized to add conditions to the standard agreement in order to protect Settlement *lands, culture, or community*. Thus again there is a balance between the collective interests of the Settlements and the individual Settlements, which includes a right to protect culture and the community. Another important feature of the Policy, is that it allows an option for affected Settlements to invest in up to one-half of the General Council's 25% participation and to earn the return. Thus this allows for the affected Settlements to earn additional revenues for the community. Interestingly, the General Council, under the Policy, exercises its option through Resco which manages the General Council's share, while having the same entitlement to the other 75% (25% GC option deducted) as any other oil and gas company.³⁶ Thus in this situation, all parties — Resco, the General Council, and affected Settlement Council — benefit.

CONCLUSION

The effect of the Metis Settlements Legislation on the long term viability of economic development is very positive. Under the *Constitution of*

Alberta Amendment Act, and the *Metis Settlements Land Protection Act*, and the *MSA*, one of the most fundamental concerns of the Metis — a secure land base — has been addressed and ensured protection. The Metis Land Registry system, while generally following the Torrens land titles system, is a separate system which achieves the same goals of the Torrens system — certainty and transferability — while at the same time recognizing the unique forms of title that exist in relation to settlement lands. The surface rights regime under the *MSA* and the *Co-Management Agreement* provide special protection for Metis culture and allow it to be factored into compensation for surface access and into the terms and conditions of resource development agreements, as well as providing for a balance between the rights and interests of the General Council and the Settlement Councils and the individual land owners. In terms of economic development, the surface rights regime ensures that the settlement and the landowner are part of the consent process and are fully compensated for access. The *Co-Management Agreement* also provides for the interests of the General Council and affected settlement to be considered as well as requiring consent of the General Council and settlement before any mineral extraction can take place. The overriding royalties and participation option give the General Council and settlements a solid revenue base which is necessary for developing Metis business and financial activities, as well as for providing the necessary resources for self government initiatives.

NOTES

1. Statutes of Alberta (S.A.) 1990, c. 22.2, c. M-14.8, c. M-14.5, c. M-14.3.
2. *Ibid.*, *Metis Settlements Act*, Schedule 3.
3. *R. v. Powley*, [1999] 1 C.N.L.R. 153 at 154.
4. *Constitution Act, 1982* (U.K.), 1982, c. 11, s. 35(1).
5. C.E. Bell, "Constitutional Rights in Section 35(1)" (1997) 36 Alta. L.R. 180 at 182.
6. C.E. Bell, "Who Are the Metis People in Section 35(2)" (1991) 29 Alta. L.R. 351 at 374.
7. T.C. Pocklington, *The Government and Politics of the Alberta Metis Settlements* (Regina: Canadian Plains Research Center, 1991) at 7.
8. *Ibid.* at 13.
9. C.E. Bell *Alberta's Metis Settlements Legislation: An Overview of Ownership and Management of Settlement Lands* (Regina: Canadian Plains Research Center, 1994) at 5.
10. *Metis Population Betterment Act*, S.A. 1938, c.6 as am. S.A. 1940, c. 6.

11. *Supra*, note 9 at 6.
12. *Supra*, note 7 at 17.
13. *Supra*, note 7 at 18.
14. *Supra*, note 7 at 28.
15. *Supra*, note 7 at 32.
16. *Supra*, note 9 at 9, 10.
17. *Supra*, note 7 at 30.
18. *Ibid.*, at 12.
19. *Supra*, note 9 at 14.
20. *Ibid.*, at 16–20.
21. C.E. Bell, *Contemporary Metis Justice: The Settlement Way* (Saskatchewan: Native Law Center, University of Saskatchewan, 1999) at 37.
22. *Ibid.*
23. *Supra*, note 9 at 37.
24. *Ibid.*, at 120.
25. *Ibid.*
26. *Ibid.* at 29.
27. *Ibid.*, at 33.
28. B. Ziff, *Principles of Property Law* (2d), (Toronto: Carswell, 1996) at 427.
29. *Surface Rights Act*, RSA, 1980, c. S-27.1.
30. *Supra*, note 21 at 475.
31. *Ibid.*, at 496.
32. *Ibid.*
33. *Supra*, note 21 at 93.
34. *Ibid.*
35. Alberta, Metis Settlements General Council (GC-P9603), A. Gaz. 1997.I.919.
36. Metis Messenger, “A History of Oil and Gas on the Settlements” (1999), online: <http://www.metis-settlements.org/oil%26gas.html> (date accessed: 10 December 1999)

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APPENDIX A

Structure of Metis Settlements

Metis General Council (MGC)

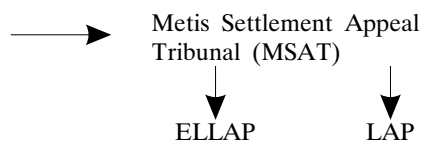
- Composed of 4 elected officers + Settlement Councillors
- Focus on policies affecting the collective interests of settlements (i.e., membership, land development)

8 Settlement Corporations

- Elected councils
- Powers analogous to a municipality

Individual Settlement Members

- Meet application criteria as set by M.G.C. and Settlement Council



APPENDIX B

Land Title/Metis Title

Crown in right of Alberta — ‘full title’
transfer through letters patent to

Metis General Council — Fee Simple title but with conditions

- Crown reserves title to M&M’s, water, fixtures etc.
- No alienation without consent of all settlements and a majority of settlement members
- Lands cannot be used as security for debt

Settlement Councils & Settlement Members

- Metis Title — s. 2.4 MGC Land Policy (similar to conditional Fee Simple)
- Includes exclusive right to:
 - (a) use and occupancy
 - (b) make improvements
 - (c) transfer Metis title
 - (d) grant lesser interests
 - (e) determine successor upon death
 - (f) additional rights provided for by MGC policy
 - (g) subject to natural rights — air, water, support

Provisional Metis Title — s. 2.5 Land Policy

- allows settlement member to have exclusive use and occupation and to make improvements needed to obtain Metis title
- Must include the conditions to be met to acquire Metis title; time within which to meet conditions; rights and duties of the title holder

Allotment — s. 2.6 Land Policy

- can be granted to a member to operate things like a farm, ranch or business for a fixed period of time, subject to renewal
- allows a member to use more land than can be acquired under Metis title — similar to a leasehold interest

APPENDIX C

<i>Surface Rights Act</i>	<i>MSA</i>
<ul style="list-style-type: none"> • s. 12 — no right of entry until have consent of owner/occupant or an REO from Surface Rights Board • s. 13 — once REO acquired, operator can enter land for specified purposes • s. 15 — Application for an REO <ul style="list-style-type: none"> — SRB can grant an order if it considers it appropriate. — If Board receives objection to REO <i>may</i> hold a hearing. • ss. 19 & 20 — Operator who exercises right of entry must pay lessor/owner/occupier <ul style="list-style-type: none"> — where unable to agree on payment, Board may decide • s. 25 — factors to consider for determining compensation: market value of land; loss of use; adverse effect on rest of owner's land; damage; factors Board considers appropriate • s. 26 — appeal of compensation order made to Court of Q.B. • s. 39 — If operator doesn't pay, Provincial Treasurer will pay out of Gen. Rev. and operator owes debt to Crown 	<ul style="list-style-type: none"> • s. 113 — Purpose — to enable operator/leaseholder to access land and to enable occupants to have their interests considered and receive fair compensation • s. 114 — Operator cannot enter unless has obtained consent of MGC and settlement council <i>and</i> consent of occupants, <i>or</i> has received REO from LAP or ELLAP • s. 115 — Application for REO-ELLAP/LAP may (a) direct parties to negotiate (c) establish means of making reasonable decision • s. 118 — Determining compensation — ELLAP/LAP may consider: <ul style="list-style-type: none"> — value for preserving a traditional Metis way of life... — value of the land <i>including the cultural</i> — disturbance to the physical, <i>social, and cultural environment</i> — other factors similar to <i>SRA</i> • s. 121 — If operator fails to pay, occupier <ul style="list-style-type: none"> — can take it to LAP — can get Provincial Treasurer to pay from Gen. Rev. fund — operator becomes Debtor of Crown

APPENDIX D

Mines & Minerals Act and Co-Management AGREEMENT

<i>Mines & Minerals Act</i>	<i>Co-Management Agreement (Schedule 3)</i>
<p>s. 9 — Authority for entering into contracts regarding the disposition of minerals or development of mines, as well as royalties and any necessarily incidental matters, belongs to the Minister, acting on behalf of the Crown</p> <p>s. 16 — Minister may issue an agreement —</p> <ul style="list-style-type: none"> • on application • by way of sale by public tender • pursuant to any other procedure determined by the Minister <p>s. 18 — The Minister has the power to refuse to grant an agreement or to cancel an agreement (only for certain reasons)</p> <p>s. 19 — An agreement shall be in the form determined by the Minister</p> <p>ss. 35 & 36 — Royalties reserved to the Crown, Crown is owner of its royalty share until disposed of.</p> <p>s. 43 — All reservations required to be made on disposal of any mineral rights owned by the Crown shall be <i>implied</i> in every disposition.</p>	<p>ss. 201 & 202 — Metis Settlement Access Committee appointed for each Settlement — composed of 5 members — 1 appt. by Minister; 1 appt. by ERCB; 1 by the Settlement corp. for that settlement; 1 by the MGC; 1 by Commissioner or by mutual agreement.</p> <p>ss. 301–302 & 306–310 — Process for disposition of Crown minerals:</p> <p>s. 303 — for the special conditions, MSAC can recommend conditions concerning environmental, socio-cultural, land use impacts, employment and business opportunities incl. Reservation of overriding Royalties, Participation option, or both, to the MGC.</p> <p>s. 304 — If MSAC recommends not to post, Minister can post anyway, but must notify leasee that disposition does not include access to settlement land.</p> <p>s. 401 — MGC and affected Settlement corp. shall have a representative consult with potential bidders.</p> <p>ss. 501–503 — Minister give MGC and ASC name of best bidder; MGC and ASC negotiate with bidder; Then either notify Minister that bid should be rejected or that a development agreement has been reached. Repeat until agreement reached, or no more bidders, or Minister stops submitting bids.</p>