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Preliminary thoughts on the First Nations Oil and Gas and Moneys Management Act

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Legislation Considered:

First Nations Oil and Gas and Moneys Management Act, S.C. 2005, c.48

The *First Nations Oil and Gas and Moneys Management Act,* S.C. 2005, c.48 ("*FNOGMMA*") came into force on April 1, 2006. However, to date no First Nations have elected to "opt into" the Act.

The Act has been promoted as a method whereby a First Nation can take control of its on-reserve oil and gas resources and thus enhance the economic rent from these resources. It is elective in that a First Nation must choose to bring itself under the *FNOGMMA* legislative regime before the statutory regime applies. The existing *Indian Oil and Gas Act,* R.S.C. 1985, c. I-7 will continue to apply to those First Nations that do not "opt into" the *FNOGMMA.* Left unstated is why Canada under the existing *Indian Oil and Gas Act* cannot similarly take advantage of "value-added" opportunities and similarly enhance the economic rent accruing to the beneficiary First Nation. (A new *Indian Oil and Gas Act* was passed on May 14, 2009, but will not be in force until the amendments to the *Indian Oil and Gas Regulations,* 1995 are complete.)

The specific wording of the *FNOGMMA* raises a number of new issues that presently do not exist under the Indian Oil and Gas regime. First and foremost, is the *FNOGMMA* an exercise in self-government or simply a delegation to First Nations of Canada's statutory powers? In this regard, it must be noted that legal title to the oil and gas resources underlying the beneficiary First Nation's reserve lands is not transferred to the First Nation when that First Nation opts into the *FNOGMMA.* The First Nation will have the powers of an owner, but is not the owner (see *FNOGMMA*, s. 34, s. 3(a)). It may be that a First Nation opting into the *FNOGMMA* thus becomes an agent of the Crown in its management of its mineral lands.

Like most recent legislation in regard to First Nations, the *FNOGMMA* has been superimposed on the existing statutory regime, most notably the *Indian Act,* R.S.C.1985, c. I-5 and the *First Nations Land Management Act,* 46-47-48 Eliz. II, c. 24. This practice of superimposing one statute on top of another provides fertile ground for the legal profession, but the policy basis for doing so is very difficult to understand. Unfortunately, Parliament's continuing political inability to amend the *Indian Act* is beyond the scope of this note. Needless to say, the legislative regime

governing on-reserve oil and gas resources would be much cleaner, simpler and more internally consistent were the *Indian Act* to be amended and the present inappropriate provisions in that Act terminated.

As well as these conceptual issues, the specific wording of the *FNOGMMA* has raised a series of new and problematic questions surrounding the jurisdiction over on-reserve oil and gas exploration and development. Some examples of these questions are as follows:

1. Since the *FNOGMMA* includes a provision whereby existing mineral "surrenders" to the Crown are deemed to no longer be of any force and effect (see *FNOGMMA*, s. 23(3)), could a First Nation membership instead simply vote to "de-surrender" the oil and gas rights within their reserve lands and NOT opt into the *FNOGMMA*?

The answer appears to be yes. The Supreme Court of Canada in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 expressly recognized the ability of a First Nation to "de-surrender" its lands. The effect of such a "de-surrender" vote would be to remove the jurisdiction of Indian Oil and Gas Canada ("IOGC") since IOGC's jurisdiction is specifically restricted to surrendered lands (see *Indian Oil and Gas Act*). IOGC would no longer be able to issue oil and gas leases on the reserve to third parties, thus freeing the First Nation to produce its own oil and gas. However, under the *Indian Act* the Minister's consent would still be necessary in order for the First Nation to sell to off-reserve purchasers oil and gas that the First Nation itself produces from its reserve.

Why would a First Nation elect to go this route rather than simply opting into the *FNOGMMA* regime? The effect of a surrender has been thrown into disarray following the Supreme Court of Canada's proclamation that rights arising from a surrender are not rights protected by s. 35 of the *Constitution Act*, 1982. In *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at para. 48 Rothstein, J. stated:

> If, on the other hand, the Crown's fiduciary obligations arose from the Surrenders, the *IOGA* and/or the *Indian Act*, the bands will have rights as beneficiaries of the Crown's obligations, but they will not be constitutionally protected rights. As such, legislation that precludes investment of Indian royalties by the Crown will be valid legislation.

Since opting into the *FNOGMMA* results in a "superseding" of the rights and obligation of Her Majesty under the surrender (see *FNOGMMA*, s. 23(3)) both options appear to do away with the uniquely Canadian constitutional notion of an aboriginal land surrender.

However, if a First Nation elected to de-surrender its mineral rights and purported to exercise its on-reserve rights stemming from Treaty, arguably those rights may once again enjoy the protection of s. 35 of the *Constitution Act*, 1982. Given the *Ermineskin* decision, it appears that to opt into the *FNOGMMA* would remove a First Nation's rights to its on-reserve oil and gas interests from any constitutional protection.

The most salient result arising from this alternative course of action arises from the fact that both the *FNOGMMA* and the new *Indian Oil and Gas Act* open the door to taxation and the sharing of resource rents by the senior governments. Arguably such actions are no longer precluded by any Treaty or constitutionally protected exemptions such as that exemplified by s. 87 of the *Indian Act*. Canada has signaled its desire, if not its intention, to take a portion of the economic rents accruing from mineral resources extraction on Indian reserve lands (see the new *Indian Oil and Gas Act* passed on May 14, 2009).

2. When a First Nations opts into the *FNOGMMA*, will it obtain ownership and title to the oil and gas resources on its reserve?

No. As mentioned above, title to the mineral lands will remain with Canada even after a First Nation opts into the *FNOGMMA*. However, the First Nation, in addition to Canada, will be able to grant oil and gas leases on its reserve lands. (*FNOGMMA* contains no restraint on Canada continuing to assert its proprietary rights to the reserve lands, including the granting of mineral interests to third parties (for example, under the *Federal Real Property and Federal Immovables Act*, S.C.1991, c. 50.))

As well, a First Nation opting into the *FNOGMMA* will be able to exploit its oil and gas resources directly should it so wish. Just as under the existing Indian Oil and Gas regime Canada is not obligated to issue rights to third parties, so too under the *FNOGMMA* a First Nation would not be restricted to exploiting its oil and gas interests only through third parties.

On the other hand, even though Canada will still be the title holder to oil and gas lands on the reserve, Canada will no longer be liable as owner of the land (see *FNOGMMA*, s. 27), nor will it be liable for environmental or resource conservation matters (see *FNOGMMA*, ss. 38, 39).

3. When a First Nation opts into the *FNOGMMA*, does it take over the role of Indian Oil and Gas Canada ("IOGC")?

No. In the legislation Parliament decided to do away with the mineral surrender or designation that presently is the sole source of IOGC's jurisdiction (see the *Indian Oil and Gas Act*). Canada decided not to delegate to a First Nation that opts into the legislation IOGC's present powers arising from the mineral surrender or designation. Instead, the First Nations who were instrumental in the passage of the *FNOGMMA* have argued that Canada is being released from its fiduciary and trust-like obligations arising under the mineral surrender in exchange for its recognition of the First Nation's inherent and treaty-based ownership and jurisdiction over the oil and gas situate on reserve lands (see the speech of Chief Strater Crowfoot of the Siksika Nation before the Senate Committee on Aboriginal Peoples during second reading of Bill C-54, November 23, 2005). As a consequence, a First Nation opting into the legislation will have the right to grant oil and gas rights without having to first seek the approval of Canada.

4. Many provincial oil and gas laws presently do not apply to oil and gas located on reserve lands. If a First Nation opts into the *FNOGMMA*, will those provincial laws then apply to oil and gas on its reserve?

No. However, the *FNOGMMA* does provide a First Nation with the option of incorporating provincial laws by reference (see *FNOGMMA*, s. 42). Any such laws incorporated by reference will presumably become federal laws for purposes of the *Constitution Act, 1982*, as they apply to Indian reserve lands.

5. As well as enabling a First Nation to take over management of its oil and gas resources, the *FNOGMMA* separately provides a First Nation with the option of having transferred to it those funds that have been collected by Canada on its behalf. Those funds historically have been deposited into the Consolidated Revenue Fund (the "CRF"). Although these funds are not segregated and are in fact treated (and spent) in the same manner as all other government revenues, Canada does keep track of the amounts of such funds deposited and under the *Financial Administration Act*, R.S. 1985, c. F-11 attributes a putative interest income to these funds. This arrangement was blessed by the Supreme Court of Canada in the *Ermineskin* decision.

Given the *Ermineskin* decision, the question now arises whether the *FNOGMMA* will permit a First Nation to take out of the CRF, not just Indian moneys deposited into the CRF, but also the interest imputed on those moneys held in the CRF, even though this interest income is not "Indian moneys" as defined under the *Indian Act*.

The answer appears to be yes. The term "Indian moneys" does not include the imputed interest that Canada credits to a First Nation's capital and revenue moneys held in the CRF. However, the *FNOGMMA* specifically provides for a First Nation accessing not only Indian moneys (moneys paid to Canada for the credit of the First Nation), but as well, the imputed interest that has been credited to these moneys by Canada since the date the moneys were first paid into the CRF.

Conclusion

The *FNOGMMA* has had a long gestation period (discussions with the "Pilot Project First Nations" that culminated in passage of the Act were first held in 1994). Unfortunately, the lengthy birthing process has not resulted in a statute that is fully formed. The *FNOGMMA* might need a further incubation period before it can be pronounced a healthy new development.