

# GISH LAW OFFICE



## Introduction...

Albertans hold about ten percent of the titles to mines & minerals in the Province while the Crown owns the rest. In many cases, the mines & minerals are passed in original homestead grants. In other cases, title to mines & minerals were conveyed to settlers by the Hudson Bay Company, Railway companies or transferred through bits of odd legislation like the *Soldier Settlement Act*.

Many Albertans own interests in oil and gas royalties as well as in the title to the mines & minerals.

Often “units” or “points” of royalty are paid out of gross royalty trust (GRT) funds administered by trust companies. Mines & minerals title holders are usually paid royalties directly by the producer. GRT’s were very popular in the 1950’s. They were spurred by the famed Leduc oil discovery in 1949 and a desire amongst neighbours to “share the wealth”. Today GRT’s are not favoured for reasons that follow.

There are complex problems of ownership and management issues that flow from title to and royalty interests in mines & minerals; this is especially so as those interests pass from generation to generation.

This pamphlet focuses on the benefits of trusts involving mineral title rather than royalties, and provides a brief sketch of other management options available to mines & minerals owners.

## Common Problems Attached to Mines & Minerals Interests...

Many of the titles to mines & minerals are or become fractionated as the title passes from generation to generation. When there are many, many owners on title it becomes very onerous for oil and gas producers to enter into a lease. The mines & minerals cannot be leased without agreement from everybody on title. One of the owners can “hold out” and prevent the others from enjoying the benefits of owning mines & minerals.

Alberta Land Titles may refuse to register on title interests that are smaller than 1/20. Again, if producers cannot readily determine who owns the interests in the mines and minerals there is

little incentive to pursue a lease. Oil and gas companies do not want to be embroiled in thorny and complex litigation that stems from paying the wrong person royalties.

Often, an oil and gas producer will insist that all royalties payable under a lease be paid to one owner or designate, who is then taxed with the responsibility of distributing payment to all the other owners. This is a foolhardy, risky and thankless task for an individual owner to undertake. That individual will be deemed a trustee for the benefit of the other owners and be subject to some of the highest liability at law for her or her accounting of royalty proceeds and for losses due to hapless handling of the business. Revenue Canada may even look to that person to pay taxes on payments received or at the very least to issue tax slips for each owner's share of proceeds. Death of the deemed trustee usually results in chaos, expense and loss for which his or her estate may well be liable.

There is a long running legal dispute about the validity of existing GRT's. Some GRT's are deemed to "run with the land" while others are deemed mere contractual agreements tied to a particular lease between the original signing parties. In short, some GRT's are legally binding upon subsequent title holders and some are not. GRT's presently lack marketability and liquidity for the above reason. Often it is not clear who is entitled to the royalty interest because of poor record keeping and past failure to transfer "units" properly. GRT's do nothing to solve the problem of fractionated mines & minerals title.

## What Is A Trust Generally?

A trust is a legal term of art that is used to describe a binding relationship between the "trustee" and the "beneficiary." A trustee is compelled by law to hold the trust asset, or property, for the benefit of another person or persons – the beneficiaries. The original legal owner of the trust asset is called the settlor. The settlor sets the terms of the trust and designates the trustee and the beneficiaries. Trusts allow for the separation of legal ownership of assets from the enjoyment of those assets.

## What Is A Mineral Title Trust (MTT)?

A MTT is formed when an owner of mines & minerals, the settlor, agrees to transfer his or her title to a trust company which in turn issues certificates of units to beneficiaries as per the settlor's instructions. The parties enter into a formal trust agreement which sets and controls the rights and obligations of the parties. It is private, it is very flexible, it is secure and lasting.

Creation of an MTT with a reputable trust company solves many of the problems that sometimes occur when a mines & minerals owner dies because title to the trust asset does not pass –

fractionation does not occur. The beneficial interest in the mines & minerals will pass to the next generation via transfer of the certificates.

Certificates of units issued to beneficiaries are readily transferable – whether in the lifetime of the beneficiary, or upon death. The day-to-day operation will not be disrupted, and the function of the trust remains intact.

Creation of an MTT solves the problem of fractionated title. The trust company is the legal owner registered on title and remains so in perpetuity or until the beneficiaries want to dismantle it.

As registered legal owner of the mines & minerals, the trust company carries out all the legal transactions (such as the negotiation and grant of an oil and gas lease) involving mines & minerals on behalf of and for the benefit of the unit holder beneficiaries, always subject to the terms of the trust agreement. For example, the settlor can instruct that a family representative be apprised of and/or consent to transactions involving the trust asset. Or there may be a term in the trust agreement stating that a majority of unit holder beneficiaries must consent to a lease.

The trust company has expertise and sophistication and is up-to-date on the goings-on in the oil and gas industry. Moreover, the trustee is legally bound to act in the best interests of the beneficiaries when carrying out transactions that involve the trust asset. Trustees are held to the highest standard of care at law.

The trustee is responsible for the distribution of royalties, does all the accounting, prepares and issues the income tax information. No liability rests with the settlor or the beneficiaries.

## Other Management Options

Mines & minerals owners may choose to manage their interests through the formation of a private holding company which issues shares, rather than units to distribute the royalties. There is less initial cost associated with the formation of a company. However, one of the main problems associated with a private holding company is that there is a limit of 50 shareholders. As generations pass, this may become very problematic. Moreover, directors and officers of companies have similar duties to that of a trustee. An accountant would still have to look after the distribution, taxes and accounting of the corporation.

Other options include changing the title to reflect a life interest plan or splitting the title for tax exemption purposes. There may be special circumstances that warrant the implementation of one of these options. However, these options do not solve the problem of fractionated title and may even serve to exacerbate it. Often, exercising this kind of option merely defers the problems associated with mines & minerals ownership to the next generation.

Clients may choose to sell their title to mines & minerals outright. This is very risky, as a true valuation of the interest is very difficult to ascertain. It may be difficult to find a buyer and there may be higher tax consequences for this type of disposition.

Of course, clients may simply choose to leave things as they are. After a consultation with our office, he or she may do so in the comfort of having made an educated choice.

## In Summary

We have experience in advising clients about MTT's and GRT's, acting on their behalf in creating MTT's and determining the validity of GRT's that may be on title. We can advise clients about other mines & minerals management options. We can recommend the best trust company, assist with tax and accounting matters, and the leasing and auditing of production. We invite you to contact us for a consultation about managing your mines & minerals title and interests