

**Independent Review of the
Mackenzie Gas Project Socio-Economic Agreement
between the Government of the Northwest Territories
and Imperial Oil Resources Ventures Ltd,
ConocoPhillips Canada (North) Limited,
Shell Canada Energy
(19 January 2007)**

Prepared for

Alternatives North

Prepared by

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Introduction

I have been asked by Alternatives North to provide a review of the *Mackenzie Gas Project Socio-Economic Agreement (MGPSEA)* negotiated between the Government of the Northwest Territories (GNWT) and Imperial Oil Resources Ventures Ltd, ConocoPhillips Canada (North) Limited, and Shell Canada Energy, and signed on 19 January 2007.

According to the MGPSEA, the Agreement is intended to:

- Help ensure that the project developers contribute to sustainable development in the Northwest Territories and the social, economic and cultural well-being of its residents and communities;
- Help address the GNWT's concern that in the absence of mitigation measures the Mackenzie Gas Project ('the Project') will have adverse effects on the provision of public services in the NWT;
- Assist, in conjunction with commitments made by the developers in their Environmental Impact Statement (EIS) and in the Joint Panel Review for the Project 'to optimize beneficial opportunities and mitigate negative impacts for NWT residents arising from the project'.
- Ameliorate the condition of certain disadvantaged individuals or groups in the NWT;
- Create a follow-up method by which the implementation of mitigative measures and commitments made in this agreement will be monitored and reported' (Recitals).

This review considers how effective the MGPSEA is likely to be in promoting these goals; and what remedies are available under the Agreement if it becomes apparent that its contribution in this regard is not as positive as anticipated by the Parties to the MGPSEA.

The review is informed by recent Australian and Canadian writing on socio-economic agreements related to resource development, and on implementation of such agreements (see for instance Corbett and O'Faircheallaigh 2005; Keeping 1998; Kennett 1999; Langton et al 2004; O'Faircheallaigh 2002, 2004a, 2004b, 2006a, 2006b, O'Reilly and Eacott 1998; Public Policy Forum 2005; Weitzner 2006). This literature indicates that if negotiated agreements are to significantly enhance the net benefits created by major resource projects they must:

- Be legally enforceable;
- Establish goals that are clear, precise, and linked to specific time frames;
- Provide incentives for compliance with obligations contained in agreements and/or penalties for non-compliance;
- Provide for regular monitoring and review of project outcomes, and contain a process for addressing any failure to achieve agreement goals;

- Provide within the agreement the human, financial and other resources necessary for their implementation;
- Establish activities and initiatives that are in addition to those resulting from existing corporate and government programs and policies.

Positive Aspects of the MGPSEA

The Agreement does contain a limited number of specific, quantified commitments that should contribute towards the goals identified above. For example the Mackenzie Gas Project partners (MGP) will contribute \$500,000 a year for 10 years and thereafter \$250,000 a year until decommissioning to a Training Fund for NWT residents (s2.5.8). It undertakes to employ 13 apprentices during construction, though none during the operational phase of the project (2.5.6.a). The Agreement also includes concrete measures to communicate employment opportunities to interested organizations and to potential employees and trainees (2.5.3). The MGP will maintain and operate a database of NWT residents seeking employment on the Project and will share information on potential recruits with government employment agencies and with contractors for the purpose of training and recruitment for the project (2.5.4).

The Agreement also contains a range of more general commitments that could also promote the identified goals. MGP undertakes to provide NWT businesses with the opportunity to participate in economic opportunities provided by the Project, subject to an overarching requirement for cost effectiveness (4.1). Contracts will be awarded on a ‘Best Total Value’ basis, which is determined solely by the MGP and which includes as one of its components the proposed involvement of Aboriginal persons and NWT residents and NWT businesses in the performance of contracts. However unlike some recent Canadian IBAs, the Agreement does not specify how much weight will be attached to such ‘regional content’ relative to the other component of ‘Total Best Value’, and so it is difficult to assess the likely impact of this provision (4.2.1). The Agreement provides for a preference for ‘qualified NWT businesses’ (4.2.2), which will receive the first opportunity to bid on certain types of project work (which are not specified) (4.3.1).

The Agreement also includes other commitments by the MGP to:

- provide training for Aboriginal people, though the absence of any specific numbers in relation to this commitment weakens its potential impact (2.5.5);
- give priority to providing offers of employment to Aboriginal persons residing in the region affected by the project, other Aboriginal persons and other NWT residents (2.2.1);
- hire graduates from the Pipeline Operations Training Committee (POTC), though again this commitment is general in terms and does not specify either minimum or target numbers of hires (2.5.5);

- offer incentives to their Project employees for Operations who agree to relocate to the NWT, though there is no indication of what form the incentives will take or how substantial they will be (2.3.5);
- employ women in non traditional occupations, though no indication is given of what occupations might be involved and there is again an absence of minimum or target numbers of hires (2.6.2a);
- provide funding for community programs, though no amounts are specified (3.2.8).

In addition, the Agreement does recognise some significant issues that arise in addressing impacts and seeking to maximise benefits from large projects. For example, it recognises the danger that the MGP will draw skilled personnel away from local communities. It requires that its members refrain from making unsolicited job offers to employees of local governments who provide key municipal services, and make ‘reasonable commercial efforts’ to discourage its contractors from doing so (5.3.10).

The Agreement seeks to minimise the net effects of the project on government, infrastructure and services, for instance by requiring that the Project Operators establish an independent source of fuel supply and will not purchase fuel in communities affected by the Project (5.2.1). The MGP will seek not to disrupt the existing level of public access to various modes or sites of transportation, using ‘reasonable commercial efforts’ to provide lead time to transport service providers to allow them to meet community requirements and undertake necessary capacity improvements (5.3.4). The MGP will also negotiate with the GNWT and local government, prior to Project construction, regarding upgrades of the public transportation system and the allocation of the costs of additional maintenance (5.3.6). The adequacy of such initiatives will of course depend on the outcome of negotiations. The Agreement also raises the possibility that the Project might add to the NWT’s housing stock, as the project operator will make ‘reasonable commercial efforts’ to afford the GNWT an opportunity to purchase some surplus accommodation units at the end of construction for conversion by GNWT to permanent housing (6.2).

The Agreement recognises the need to ensure that relevant obligations flow through to contractors working on the project, and provides for monitoring and enforcement of contractor compliance, including the application of sanctions, applied at the discretion of the Operator employing the contractor (4.3.3, 7.12). However the effect of these provisions is diminished by the fact that elsewhere in the Agreement the imposition of obligations on contractors is subject to conditions. For instance contractor obligations in relation to training and employment are subject to ‘reasonable commercial efforts’ (7.1.3) which, as noted later, are defined in a way that confers considerable latitude to affected contractors in determining exactly what their obligations will be.

Weaknesses in the MGPSEA

The MGPSEA displays a number of features that are likely to seriously undermine its capacity to promote the goals identified in the Agreement.

Enforceability and Implementation

An obvious and indeed overwhelming issue with the Agreement is that it contains numerous features that tend to undermine its enforceability, its utility as a framework for action, and the prospects for its successful implementation.

One major issue involves the absence of concrete and binding goals or targets. Goals tend to be expressed in general terms, for example to support ‘the development of Northwest Territories manufacturing’ (4.4.3). Where concrete goals are specific they tend not to be binding. For example in relation to project employment, it is stated that ‘it was estimated in the EIS and JRP that up to 16% of direct employment opportunities during construction and 72% ... during Operations could be filled by Aboriginal persons or NWT residents’. The Agreement heading under which this statement is made is ‘Employment – Objective’, but the relevant clauses do not state that the figures represent binding goals and the ‘Interpretation’ section of the Agreement states that ‘Headings do not affect the interpretation of this agreement’. In this context, the clause involves nothing more than a statement of fact in relation to an estimate contained in the EIS and JRP.

There is frequently an absence of any specific information regarding how a goal will be pursued and of specific agreement provisions that would support its pursuit. For instance in relation to the commitment to maximise employment opportunities for Aboriginal persons and NWT residents, the MGP’s undertakings either simply involve complying with existing legal obligations (for example ‘not discriminate against Aboriginal persons’), or give no indication of how the relevant initiative is to be achieved (for instance ‘provide a workplace where all individuals are treated in a fair, equitable and respectful manner’) (2.1.2.). Similarly, the MGP undertakes to discourage non-NWT residents from migrating to NWT to seek project employment (2.3.2.c, 2.5.2.d), but no indication is provided of how this objective might, or could, be achieved. The Parties agree to ‘collaborate where mutually beneficial to develop mechanisms to facilitate and streamline regulatory and administrative mechanisms and administrative processes applicable to the Project’ (5.6.1). No indication is provided, for instance, as to how or when this will occur, what areas of regulation might be involved, or what sorts of ‘mechanisms’ might be employed. The GNWT undertakes to report on the ‘net effects’ of the project on Government, including ‘use of government systems’ and ‘system costs’. No indication is provided as to how or by whom or how frequently these variables will be measured (8.5.3). Indeed the Agreement often reads more

like a general statement of aspirations rather than a concrete measure to bring about specific outcomes (see for example clause 6.4 on Technology, Knowledge and Skills Transfer).

Another major issue involves the wide discretion available to the Parties in interpreting their commitments. For instance the MGP is the sole judge in determining whether potential employees have the requisite skills and experience (2.4.2), and it exercises discretion in determining whether equivalency to education or training should be considered in recruitment (2.4.2). Similarly, the insertion of the phrase ‘may include measures such as’ prior to listings of agreement initiatives leaves considerable discretion with the MGP, as for instance in relation to provisions regarding on-the-job support for workers (2.5.11).

The GNWT also enjoys wide discretion in determining the nature and extent of its obligations under the Agreement. So for instance it is not obliged to provide education and training in the summer season to avoid conflict with employment opportunities during winter construction season, but only to ‘consider’ doing so (2.7.1). In the same vein it will ‘consider’ providing initiatives to support community well being and strategies to deal with the possible increase in stress and family conflict in NWT communities (3.7.2). The GNWT has a wider source of discretion in that many of its commitments are ‘subject to and in accordance with GNWT policy and programming’ (2.7.1, 3.7.1, 3.7.2, 4.6.1, 6.7), which are presumably subject to change in accordance with Government priorities. In addition, the Government in effect has a blanket ‘opt-out’ in relation to its commitments as a result of clause 10.1.1, which states that it is a condition of the contract that ‘an expenditure pursuant to the contract will be incurred only if there is sufficient uncommitted balance in the appropriated item for the fiscal year in which the expenditure is required under the contract’. If the GNWT does not make a relevant budget allocation, relevant obligations under the Agreement presumably cease.

A further and highly significant source of discretion for the MGP is the insertion of phrases such as ‘to the extent commercially reasonable’ or ‘reasonable commercial efforts’ at numerous points throughout the Agreement (see for instance 2.4.5, 2.4.6c, 2.5.9, 3.2.1, 3.2.3, 5.3.10, 3.3.1.c, 3.3.2.a, 3.4.2, 3.6.3, 4.2.4, 4.4.1). The question of what is ‘reasonable’ is of course subject to interpretation, and its frequent use raises a fundamental issue in relation to enforceability of the Agreement. The interpretation of the term ‘reasonable commercial efforts’ offered by the Agreement (1.2.9) does not assist in resolving this problem. Such efforts equate to:

reasonable, diligent, good faith efforts to accomplish such objectives as would normally be devoted to the applicable task by a prudent commercial enterprise with similar resources to those of the applicable Party, where such Parties are motivated to accomplish such task to the extent practicable, taking into account, without limitation, consideration of profitability and other relevant commercial factors and the mitigative purpose sought by this Agreement. The phrase does not mean or imply that a party will actually accomplish the applicable objective ...

The definition simply raises further matters for judgment or interpretation, including the definition of a ‘prudent’ commercial enterprise and the issue of how ‘similarity of resources’ is to be established.

The same issue arises in relation to use of other terms that are open to interpretation, for instance the commitment to ‘*periodically* make country foods available’ (3.4.1.a) and to support traditional lifestyle initiatives ‘*in a manner that is consistent with* [the MPG parties’] *respective principles and policies*’ (3.4.1.c); and that the Operators will give *reasonable* notice of decommissioning (11.3.1).

Another factor that weakens the force of certain Agreement provisions is that they are not accompanied by monetary commitments. So for instance the MGP commits to support cultural activities and events and to support community based traditional lifestyles (3.4.1.c), but no indication is provided as to the form of this support or of the funding commitment to it. In reporting on cultural events and activities, the Project operators have to provide information only on the number of such events, not on the dollar value of the support provided (8.5.2.g).

The extent to which the Agreement is characterised by uncertainty as to the force of the Parties’ obligations and by discretion on the part of the MGP is illustrated by a number of provisions related to business opportunities. The final clause of this part of the Agreement (4.4.6) states that the MGP reserves the right ‘to employ simplified procurement procedures where there is a minimal estimated contract value’ (4.4.6). However the ‘minimal contract value’ is not specified and so presumably is at the discretion of the MGP. In principle, this provision could be used by the MGP to escape many of its obligations in relation to business opportunities and contracting. In addition, it is stated that:

Corporate agreements are generally established by MGP for the supply of certain goods and services on a company wide, long term basis. MGP may opt to or may be contractually required to obtain Project Work through these corporate agreements without restriction (4.3.4).

This clause appears to give MGP the ability to avoid in practice any preference it is supposedly obliged to give to GNWT businesses.

The extent to which the Parties may escape their obligations under the Agreement is highlighted by the fact, discussed below, that the Agreement contemplates that the GNWT may simply decide not to comply with its commitments to fund the Socio-Economic Advisory Board (Schedule “A”, 3(f)), a key component of the MGPSEA’s approach to monitoring and mitigation of adverse project effects (see below).

Another issue is the general absence of any provision for mandatory action if Agreement goals are not being met or if it becomes clear that the Project is creating negative impacts, or for any sanctions against Parties if they fail to respond to such situations. Indeed the Agreement does not appear to contemplate any particular strategy for addressing negative project effects. For instance, the Socio-Economic Advisory Board will report annually on actual versus predicted impacts and on the effectiveness of mitigation measures, and provide copies of its reports to the Operators and the GNWT. The latter will assess the reports and respond to recommendations, but there does not appear to be a requirement on any Party to take any concrete action to deal with the situation (8.6). Similarly, in relation to specific issues such as the Project's impact on school retention, there is no indication of what is to occur if the measures identified in the Agreement to deal with this issue are unsuccessful (2.6.1.c). To cite another example, the Agreement states that it is the 'long-term goal' of the Project Operators to locate in NWT their permanent, FT employees directly involved in pipeline (2.3.3). No remedy is suggested for dealing with a situation where this does not occur.

Impact Monitoring

As mentioned earlier a key goal of the MGPSEA is to create a follow-up method by which the implementation of mitigative measures and commitments are monitored and reported. The Agreement has a number of major weaknesses in this respect.

First, other than through the generation of advice from a Socio-Economic Advisory Board (see below), there is a lack of detail regarding how verification of socio-economic outcomes described in the EIS is to occur; how Agreement outcomes are to be assessed; how the effectiveness of mitigative measures is to be gauged; or, where such measures prove ineffective, how the development of 'new mitigative measures' is to occur (8.2.1). The relevant provision calls for 'direct and timely response of the Parties to recommendations', but provides no indication of where the recommendations originate from or what they relate to (8.2.1.d). The Agreement indicates that the Operators will create three regional working groups to assist the Operators in managing project related impacts during construction, but fails to indicate how or when they will be established or resourced (8.3.3.b).

The Agreement does establish a Socio-Economic Advisory Board, but its role is solely advisory, and it has no independent capacity to initiate new or alternative measures. Indeed it requires the unanimous approval of the Parties before it can undertake 'other work or studies directly related to the subject matter' of the Agreement (8.4). In addition, there are major issues about the resources available to support the Board's work. It is required to consider information on and offer advice on the accuracy of predicted socio-economic effects, the effectiveness of mitigative measures and the development of new mitigative measures, yet it will have no permanent staff or premises. Its budget is \$200,000 per annum until the end of the first year after the National

Energy Board grants leave to open the Pipeline, and \$75,000 annually thereafter (Schedule “A”). In my experience this level of funding is totally inadequate to support any significant monitoring or advisory effort, and indeed an annual allocation of \$75,000 could easily be absorbed in assessing the effectiveness of mitigative measures in relation to a single area of impact. The budget allocation is even more inadequate if, as implied by the relevant provision, it must cover the cost of Board participation by Directors who are Aboriginal Authority members (Schedule “A”, 3(b)). In addition, Schedule A, 3(f) clearly contemplates that the GNWT may decide not to comply with its commitments to fund the Advisory Board, in which case it is dissolved.

At a more fundamental level, it is intended that the Board will meet only annually during Project Operations (8.4.6). It is difficult to understand how a body responsible for ongoing monitoring of a major project and for responding to any failures in mitigative measures could function effectively on the basis of annual meetings and in the absence of permanent staff.

Agreement Provisions as Compliance with Legal Obligations

As a matter of common sense, a negotiated agreement should require actions or commitments beyond those that would routinely be undertaken by the parties in meeting their legal obligations and/or in implementing existing policies. Otherwise it is difficult to justify the cost of negotiating and implementing an agreement.

A substantial number of the MGPSEA’s provisions appear to involve undertakings to comply with legal obligations. So for instance the MGP undertakes to administer personnel policies in accordance with applicable regulations (2.4.7); to treat individuals in a fair and equitable manner (2.4.8); to treat women on an equal basis with men (2.4.9); and to provide equal employment opportunity to individuals who are qualified to perform job requirements (2.4.6). As discussed earlier, the Agreement also makes clear that many of the actions to be undertaken by the GNWT constitute part of its standard programs and policies as they exist from time to time.

Conclusion

The MGPSEA has some positive features, containing a small number of concrete initiatives and a number of general commitments that should assist, in particular, in enhancing the training and employment opportunities associated with the Project. However the Agreement has a number of fundamental weaknesses that suggest it will be of limited utility in pursuing the goals identified by the Parties and discussed in the Introduction.

Most importantly, key features of the Agreement, including the absence of specific and binding goals and of concrete strategies to pursue goals, the discretion afforded the Parties in defining

their commitments, the existence of broad ‘opt out’ clauses that permit Parties to avoid those commitments, and the absence of any mandatory requirement for specific responses to negative impacts or to the failure of mitigative measures mean, in combination, that the Agreement is effectively unenforceable and may also be largely incapable of implementation. This is so to an extent that I have rarely observed in any negotiated agreement. In effect, in large measure the Agreement simply constitutes a broad and non-binding statement of principles and goals by the Parties. In addition, it consists to a significant extent of measures the Parties would undertake in any case as part of their normal course of business.

Specific problems also arise in relation to the role of the Agreement in monitoring and responding to Project impacts. The Board responsible for this function is advisory only, will meet once a year during Operations, will have no permanent staff, is not adequately resourced, and there is no requirement on any Party to take action in response to its findings or recommendations.

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