

CANADA'S ARCTIC SOVEREIGNTY AND NUNAVUT'S PLACE IN THE FEDERATION

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In 1993, the government of Canada and the Inuit of the high Arctic signed the Nunavut Land Claims Agreement, which created the new territory of Nunavut. According to Michael Mifflin, this strengthened Canada's sovereign claim over its Arctic lands and waters. But 15 years later, he says, Canada's credibility is waning because the federal government has not lived up to its commitments, notably to create a government that is representative of the population. Here, he critically examines the delays in implementing the Agreement, the persistent social gaps and the problems Nunavut faces in terms of fiscal autonomy and governance. He suggests that granting Nunavut provincial status could help solve several of these problems as well as reinforce Canada's sovereignty claims.

Le gouvernement canadien et les Inuits du Haut-Arctique ont signé en 1993 l'Accord sur les revendications territoriales du Nunavut qui a créé le territoire du même nom. Selon Michael Mifflin, cette entente a raffermi les aspirations de souveraineté du Canada sur ses terres et ses eaux arctiques. Mais 15 ans plus tard, affirme-t-il, Ottawa a beaucoup perdu de sa crédibilité dans ce domaine étant donné qu'il n'a pas donné suite à ses engagements, notamment en ce qui concerne la création d'un gouvernement représentatif. L'auteur examine les raisons de ce retard, ainsi que la persistance des écarts sociaux et les difficultés que rencontre le Nunavut en matière de gouvernance et d'autonomie fiscale. Faire du Nunavut une province pourrait, selon lui, aider à résoudre certains problèmes, tout en renforçant les revendications de souveraineté du Canada.

In 1993, then Prime Minister Brian Mulroney began the largest nation-building project Canada has seen since Newfoundland joined confederation in 1949 — to draw Canada's definitive northern borders. Those borders would form a new jurisdiction in the Canadian federation and be based entirely on historical and present Inuit occupation. In doing so, Canada could lay claim to all of the lands and waters of the Arctic Archipelago.

Mulroney's government signed a contract with the Inuit of Nunavut asking them to "cede, release and surrender to Her Majesty The Queen in Right of Canada, all their Aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada" on behalf of them and "their heirs, descendants and successors." In return, Canada agreed to create a new legal jurisdiction in the Canadian federation and to build an Inuit majority public government.

The resulting agreement, the Nunavut Land Claims Agreement set a new precedent in land claims and in gov-

ernment-Aboriginal relations. Not only is Nunavut the largest land claim settlement in history (approximately 2 million square kilometers or 20 percent of the country) but it is also a binding contract with an aboriginal group to create a public government that is representative of the population. This creates a unique situation in which the federal government is legally obligated to ensure that the Nunavut government has the financial and human resources to fulfill its functions as a government, and both governments are obligated to ensure that Inuit are trained to occupy 85 percent of the positions within the Nunavut public service.

In signing the Nunavut Land Claims Agreement, the Inuit of Nunavut agreed to forgo the typical Aboriginal self-government arrangement that exists in other land claim settlements and Indian reserves across Canada. The Inuit of Nunavut opted instead for a government that would control an entire jurisdiction in the Canadian federation. The decision stemmed from the belief that within the Canadian political system, a government like those of

the Canadian provinces would be best suited to deliver the rights and benefits provided by the Nunavut Land Claims Agreement.

It is now 15 years since the Government of Canada promised to hand over the powers of governance to publicly elected leaders, but it has not yet lived up to this engagement. After several attempts at negotiation and requests for arbitration, the Inuit of Nunavut have

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Although the federal government has created the new legal jurisdic-

mandate or proven experience to deliver on Ottawa's promises, particularly the promise of building a government.

Criticism of the Department of Indian and Northern Affairs (INAC)'s ability to perform its functions runs deep. In 1996, the Royal Commission on Aboriginal Peoples determined that INAC was "evasive or negligent on the matter of meeting federal treaty and claims obligations" and that "it operates under a legacy of colonialism and paternalism." The

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launched a \$1-billion lawsuit against the Government of Canada for failing to fully implement the Agreement.

The lawsuit was filed in 2006 in the Nunavut Court of Justice by the Inuit land claim organization Nunavut Tunngavik Incorporated (NTI). In 2007 the federal government filed a motion to force NTI to include the Nunavut government as a co-defendant in the suit, stating that they had equal responsibility for implementing the land claim agreement. This motion was dismissed by the court on the grounds that the Nunavut government was not a signatory to the land claim agreement. The federal government has since appealed this decision.

It is my contention that the fate of Nunavut is intimately linked to the credibility of Canada's claim to Arctic sovereignty. Indeed, the delays in implementing the Agreement and the persistent gaps and problems Nunavut faces in terms of fiscal autonomy and governance considerably weaken Canada's claim to the Arctic lands and waters. In failing to provide Nunavut all the means to ensure its economic, social and cultural development,

tion of Nunavut and its government, it has withheld the funding and support required in order for the Nunavut government to provide the social, cultural and economic benefits promised in the agreement. Following the creation of the Nunavut government, Ottawa did not provide the funding and training initiatives needed to transform the Nunavut government into a predominantly Inuit public service. This was a key promise

commission actually recommended INAC be disbanded, a recommendation that was never implemented. Seven years later these criticisms resurfaced. In a 2003 report to the House of Commons, the Auditor General of Canada highlighted INAC's inability to devolve powers and implement land claims in Nunavut, the Northwest Territories and the Yukon. In her report, the Auditor General concluded that INAC has inadequate management structures, lacks accountability and has not worked to support the full intent of the Nunavut Land Claims Agreement.

But ultimately it is likely a case of mistaken perspective: Ottawa is viewing the building of the new territory as being no different than the oversee-

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the Crown made in the Nunavut Agreement. Thus, Nunavut's government remains woefully understaffed and unable to deliver essential public services effectively.

Why has the federal government fallen so far short of its end of the deal? One could argue that the department charged with implementing the Nunavut Land Claim lacks the necessary

ing of an Indian reserve — something to be administered in perpetuity by the Department of Indian and Northern Affairs — rather than viewing the creation of Nunavut as a commitment from one public government to another.

Paradoxically, Canada does have proven experience in delivering governance and development assistance

abroad. In countries such as the Ukraine, Haiti and Afghanistan Canada has proven its ability to coordinate the provision of assistance from multiple federal departments and agencies. By lending experienced administrators, technical staff and funding packages to the governments of developing countries, Canada has helped to build their necessary institutional capacities and expertise for the delivery of public services and governance. The success of Canada's development work overseas is based on the premise that assistance can only be successful if it is controlled and delivered by the local government, elected by the local people.

Unfortunately, we have not drawn on this experience while attempting to deliver development and governance assistance in Nunavut. The federal government should have set up a development team at the service and command of the newly elected territorial government. In practice, this team would have a mandate for building capacity within the Government of Nunavut. Similar to Canada's international development work, the team would have clear timelines and objectives and, most importantly, an exit strategy.

Another key problem has to do with the fact that territories are constitutionally inferior to provinces. Although Canada's territories are independent jurisdictions in the federation, they differ from provinces in four key ways: they cannot borrow money; they do not have a constitutionally protected right to equalization and transfer payments to ensure that standards of living, infrastructure and social services are on par with citizens living across the country; they do not own the lands and resources within their own boundaries; and they do not receive any royalties from those resources.

True, the federal government does provide payments and transfers to the territories through the Territorial For-

mula Financing (TFF) to help them provide equal levels of services, infrastructure and health care. However, unlike provinces, territorial governments have almost no other sources of revenue. In Nunavut, for example, TFF transfers represent 84 percent of the government's revenue. Furthermore, what little revenue can be collected

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from other sources, such as corporate or personal income tax, is subtracted or clawed back at the rate of 80 percent. The level and structure of the TFF transfers effectively acts as a disincentive for economic development and a barrier to self-sufficiency.

The complete inadequacy of the TFF program was highlighted in the 2006 report to Parliament from the Expert Panel on Equalization and Territorial Formula Financing.

In its report the Panel stated that "when Nunavut was established as a territory on April 1, 1999, TFF funding was not designed (nor was it adequate) to address existing deficiencies in health, housing, education, and social infrastructure, programs, and services." The panel indicated that even adjustments to the TFF would not be sufficient to address the serious gaps in Nunavut's programs, services and infrastructure. The panel concluded that Nunavut's serious disparities must be addressed on an urgent basis with targeted funding programs.

Despite rhetoric from the recent federal Throne Speech on strengthening sovereignty, governance and devolution in the north, Nunavut's government is prevented from generating the financial means to provide its citizens with basic infrastructure and public services. While

provinces are typically able to raise these revenues through resource development royalties, the Government of Canada (through INAC) has retained ownership and control over Nunavut's lands, waters and natural resources. As a result, Nunavut does not receive any royalties from the exploitation of its natural resources.

In the longer term, this will likely become even more problematic, as Nunavut's natural resources are some of the most important in the world, geologically comparable to those of South Africa, Australia and Brazil. With significant deposits of diamonds, gold, iron and uranium, and an estimated 20 percent of Canada's oil and gas reserves, Nunavut's economic potential is greater than most provinces'. Given this fact, it is shameful that more than 50 percent of Nunavut's youth do not graduate from high school, that the suicide rate is nine times the national average, that 54 percent of the population lives in crowded housing conditions, and that Nunavut's citizens have a life expectancy 10 to 15 years lower than that of southern Canadians.

Simply put, the Nunavut government has been given the responsibility of providing education, health care, roads and jobs, but not the means to properly fund these services. The federal government has not agreed to setting timelines and milestones for devolving powers to the Nunavut government, and it does not have any exit strategy. It is clear that in the coming years, there will continue to be an overt federal presence in the ownership and administration of Nunavut's natural resources.

Of particular concern is its unwillingness to transfer control of the oil

and gas resources located between the islands of the Arctic Archipelago to the Nunavut government. Ottawa claims that the seabed resources of the Arctic Archipelago are offshore of Nunavut and thus fall under federal jurisdiction. But Canada's whole claim to ownership over this seabed rests on the existence of Nunavut's boundaries — which were drawn to include all of the waters of the Arctic Archipelago — based on Inuit "traditional and current use and occupation of the lands, waters and land-fast ice therein."

It seems as though Canada would like to have it both ways: claiming on the one hand during discussions of Arctic sovereignty that the internal waters of the Arctic Archipelago belong to Nunavut, and on the other hand during discussions of oil and gas revenues that the same internal waters do not belong to Nunavut. But why should Nunavut's jurisdiction over its internal waters be different from British Columbia's jurisdiction over the internal waters of the Strait of Georgia between the British Columbia mainland and Vancouver Island?

The paradox of Canada's claim to ownership and control of these Arctic waters is that Canada has not taken any steps to build Nunavut's transportation infrastructure and capacity to administer Arctic waters and communities. There are no roads linking any of Nunavut's communities, no ports to administer marine transportation or regulate Canadian Arctic waters, and communities are completely dependent on diesel electric generation for power. This impairs both Nunavut's economic development and Canada's ability to administer and control its northern waters.

In the provinces, this infrastructure is normally acquired through provincial-federal cost-sharing initiatives or provincial public-private partnerships. In Nunavut, however, it is INAC, and not the territorial government, that controls access to both types of financial program. Since Nunavut's creation, INAC has been



Courtesy of Michael Mifflin

Map of Nunavut, the largest land claim settlement in history, with approximately 2 million square kilometers, or 20 percent of the country.

issuing the permits for natural resource development companies to build the major transportation and energy infrastructure needed to access and exploit Nunavut's vast stores of natural resources for private and federal profit. Despite the needs of Nunavut's communities, and the pleas from Nunavut's government for assistance, none of this infrastructure will be linked by road, rail, ship or power line to the isolated communities in close proximity to most of these major developments. As

a result, an entire network of highways, railroads, icebreakers, deepwater ports, and airstrips, as well as hydropower and wind power generating stations will provide no benefit to the communities of Nunavut, nor will they be available to Canada to administer its northern waters or for Nunavut to gain badly needed infrastructure for community economic development.

The federal government does have a policy of devolving "province-

like” powers to territorial governments, but its implementation is entirely dependent on its own whims and priorities. For instance, it took no less than 105 years to devolve all of the “province-like” powers to the Yukon Government. This process was completed in 2003. But Yukon still does not have ownership of its natural resources, nor has it been granted provincial status.

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The idea of an evolution of the Canadian federation north of the 60th parallel, that is, Nunavut’s ascension to full provincial status, has been sorely missing from recent devolution negotiations. These negotiations have been focused merely on gaining “province-like” powers. In my view the Nunavut government has entirely underestimated the power of its greatest bargaining chip: to assert or deny Canada’s claim to Arctic sovereignty.

Historic precedent exists for admitting territories into Confederation as provinces. On three occasions in Canadian history a prime minister had the necessary foresight and vision to create new provinces from its northern territories. In 1870, the government of Sir John A. Macdonald negotiated a settlement with the Métis people of Rupert’s Land and created the Province of Manitoba. Manitoba did not undergo a period of transition as a territory; it was admitted into the Canadian federation as a full province with the power to provide services to its people and targeted payments to bring its level of governance and infrastructure on par with the Canadian provinces.

Again in 1905, Sir Wilfrid Laurier’s government created the jurisdic-

tions of Alberta and Saskatchewan from its northern territory and admitted them as provinces with similar province-building financial incentives. Full ownership and control of natural resources was later transferred to the three prairie provinces in three separate resource transfer agreements in 1930.

With the creation or admission of a new province in the Canadian feder-

ation comes, of course, a robust package of financial and infrastructural benefits. Canada has built railroads and highways, hundreds of small craft harbours and deepwater ports and even interprovincial ferry services to link its provinces from the Atlantic to the Pacific. When Newfoundland joined confederation in 1949, a Royal Commission was launched to recommend measures for bringing it up to the level of services as the other provinces. As a result, Newfoundland

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received multi-million dollar payments over more than a decade to ease its transition to provincehood.

Ownership of onshore and coastal oil, gas and mineral resources is a key attribute of being a province in Canada. New precedent in Atlantic Canada further allows provinces to capture 100 percent of royalties from offshore oil and gas resources. If Nunavut is to have the means to pro-

vide services on par with those of southern Canadians, why should its terms of union be any less favourable than those afforded to the other Canadian provinces?

Great consideration should be given to the strategic importance of financing and constructing transportation infrastructure for Nunavut communities. Providing Nunavut with ports, roads, airstrips, railroad and intercommunity ferry services is essential to unlock Nunavut’s vast stores of natural resources and to administer marine transportation in Canadian Arctic waters. With even nominal foresight and

northern strategy, the federal government could help secure much of Nunavut’s infrastructure needs within the next 10 years. Industry is waiting for the financial incentive to develop Nunavut’s mineral and petroleum resources — incentive that could easily take the form of shared-cost transportation and energy infrastructure, devised to benefit both the industry and the communities of Nunavut.

Canada’s northern strategy needs to be more than broken promises, out-

dated colonialist institutions and meaningless posturing from the throne. Nunavut’s citizens are not second-class Canadians, they are the key to defining Canada’s northern borders, its Arctic sovereignty and its credibility as a northern nation.

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