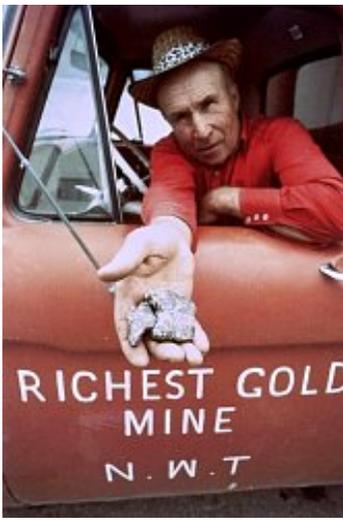


# Devolution and Resource Revenue Sharing in the Canadian North: Achieving Fairness Across Generations

Stephanie Irlbacher-Fox and Stephen J. Mills





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## Introduction

This discussion paper was commissioned by the Walter and Duncan Gordon Foundation in advance of its first general forum on northern policy options. This year's forum will focus on devolution and resource revenue sharing in Canada's northern territories, with particular emphasis on the Northwest Territories (NWT). The forum's purpose was to generate discussion and ideas about how change in fiscal and political power sharing among governments might be shaped by taking intergenerational equity into account. A key question posed to participants in preparation for this event is: how do we fairly distribute the benefits of non-renewable resources activities across generations? This paper provides an overview of progress on devolution and resource revenue sharing within the three territories, current to May 2007. Serving as an evidentiary basis for discussion, it contains an overview of emerging issues and lessons learned from devolution and resource revenue sharing negotiations and agreements.<sup>i</sup> Drawing from the experiences of Indigenous peoples' governments and from other jurisdictions which address issues of intergenerational equity in their stewardship of non-renewable resource benefits, this paper presents options for promoting intergenerational equity as a desirable fiscal, economic, and social policy goal.

During the last few decades, Canada's northern territories have evolved from frontier colonies of Ottawa to province-like jurisdictions distinguished by the incorporation of Indigenous peoples' rights into their constitutional bases of existence and practices of governance. This political maturity is signaled by devolution, where control and administration of lands and resources is being devolved from Canada to territorial and Indigenous governments. These governments will also share in resource revenues. International events have focused attention on the proximity and vastness of oil, gas, and mineral resources in the North, at the same time that evidence of global warming presents both threat and opportunity to the lifeways of Northerners. These changes promise to render the North no longer as harsh and inaccessible as it once was, with significant economic, social, and political implications.<sup>ii</sup>

Like most of the circumpolar world, natural resources are economic drivers in the territories.<sup>iii</sup> Many resources are non-renewable, so by definition their extraction is unsustainable. To date, under a management and royalty regime controlled by the federal government, resources have been developed with a view to primarily national versus northern interests. The political ascendancy of Indigenous peoples' governments in the North has required industry and government to provide assistance for economic and social impact mitigation.<sup>iv</sup> Land claim and self government agreements establishing Indigenous governments' authorities have also had the effect of enhancing territorial government credibility and influence at the national level: because of land claim and self government agreements, territorial governments' authorities and responsibilities are in cases constitutionally protected. And, their necessity as a coordinating body for various

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new public/Indigenous self governments' authorities and financing increases their position *vis-à-vis* the federal government with respect to devolution.

Yet it may appear that northern governments' economic dependence on primary resource extraction and lack of control over regulatory and fiscal policies relegate their socioeconomic involvement primarily to monitoring and managing the labor pool necessary for resource extraction. For example, through targeted employment incentives and by recasting northern colleges as technical training centers for mining and oil and gas extraction vocations, and occupations in related secondary and service industries. Notably, resource extraction companies have often contributed funding and programming to address labor management issues. The context for education and training is usually resource extraction activities designed to maximize profits over short periods, for example diamond mines such as Ekati being scheduled to run 24 hours a day over a 25 year lifespan, or a construction timeline for the Mackenzie Gas Pipeline that will see an influx of 7000 workers over 3 building seasons, with 100 permanent and contract positions over the rest of its 25 year life.<sup>v</sup> The massive scale of some of the operations and impacts can tax the ability of governments to effectively regulate, monitor or mitigate social, environmental, and economic impacts.<sup>vi</sup> At the same time, secondary and service industries do stand to benefit. Also, increased levels of taxable and disposable income in many communities provide opportunities that people literally cannot afford to pass up, particularly in smaller communities where unemployment at some times of the year regularly crests 40% or more.<sup>vii</sup>

This paper provides an overview of the importance of both power and revenue sharing among governments for promoting sustainable economic development in the North. In devolution talks to date, and within the broader public discussion about devolution, the division of existing royalty revenue streams has been a principal focus. However, recent studies by the Canadian Arctic Resources Committee and the Pembina Institute show that overall royalty regimes and associated fees also warrant attention.<sup>viii</sup> Developments such as the Alberta tar sands demonstrate the potential for the way royalty regimes can promote development that can negatively affect the social, cultural, and environmental well being not only of their immediate areas, but in neighboring jurisdictions, such as the southern Northwest Territories.<sup>ix</sup>

However, northerners need only look in our own backyards to see the results of resource extraction activities conducted under favorable royalty regimes and without regard for environmental and social impacts. The churned gravel hills scarring Dawson City's outskirts, the arsenic piled by the tonne at Yellowknife's Giant mine threatening the local water, and turquoise lakes bereft of life years after the closure of Pine Point are not fictions. They stand as warnings to governments and taxpayers, and to our generation. Devolution and associated authorities provide a moment to act courageously in the long term interest. Northerners must challenge ourselves to seek innovative and sustainable options for achieving long term sustainable economic development, options that must be

considered as we engage in talks determining the shape of future power and resource sharing.

## Key Terms

**Devolution:** a transfer of jurisdiction and authorities to territorial and Indigenous and self governments, from the federal government ranging from authority over such areas of health, to the regulation of lands and resources. Devolution also encompasses the transfer of ownership and control over lands and resources. Unlike in provinces, underlying title remains with Canada, thus there is no “Crown” in right of the territories.

**Economic Rent:** the excess value of an extracted resource, after production costs and a reasonable profit. The value of a resource can vary, as can extraction costs.

**Impact Benefit Agreements:** are also referred to as access or participation agreements, and are made between Indigenous peoples and resource extraction companies, addressing issues of access, compensation, and participation in activities taking place within Indigenous peoples’ traditional territories.

**Non-Renewable Permanent Funds (NPFs):** may be established through regular contributions of a portion of economic rent over a period of time. NPFs may be used to stabilize government income streams or to target economic, social, and environmental wellness and stability.

**Resource Revenue Sharing:** agreements about how resource revenues are shared among governments. Resource revenues may include royalties, fees, and taxes levied on resource development. Revenue sharing provisions are contained in land claim agreements. Revenue sharing deals associated with devolution are between Canada, territorial, and Indigenous governments.

**Sustainability:** the Brundtland Report of 1987 defines sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” Development is conceived of as changes impacting economic, social, and environmental dimensions. We apply this notion to the political, social and economic developments experienced in the North.

# Devolution and Resource Revenue Sharing in the Yukon, Northwest Territories, and Nunavut

## *The Yukon*

The Yukon is the only territory with devolution and resource revenue sharing agreements with Canada. Effective November 1998, the Yukon Oil and Gas Accord (YOGA) provided for the transfer of administration and control of oil and gas, and collection of royalties by the Yukon Government. Currently, there are draft royalty regulations created by the Yukon government in October 1999 that would modernize the royalty regime inherited from Canada. However, these draft regulations are not expected to result in significant changes to the current royalty regime.<sup>x</sup>

For other non-renewable resources as well as forestry, the Yukon Government completed their devolution and resource revenue sharing agreement with Canada during 2001, which came into effect in 2003. Also present at the table were the Council of Yukon First Nations (CYFN) representing 11 of the 14 Yukon First Nations and the three non-CYFN First Nations. First Nations were recognized as key stakeholders, on the understanding that the Devolution deal would not go ahead without their consent.

The agreement provides for the administration and control of most public lands, resources on those lands (such as forests, mines and minerals) and water rights to be transferred from Canada to the Yukon Government. In addition, the Yukon Government will collect all associated royalties, rents, and fees. Prior to devolution, these were authorities of Canada under the Indian and Northern Affairs Canada (INAC) Northern Affairs Program. Canada retains the right to take back administration and control of public lands for national interest purposes. The transfer included employees and assets, as well as one-time and ongoing implementation funding.

There are provisions relating to one-time and limited term funding for forestry management and forest fire suppression. The resource revenue sharing provisions will result in a “net fiscal benefit” to the Yukon government with no impact on transfers under the Territorial Financing Formula (TIFF) for the first \$3 million in royalties received per year. Responsibility for existing and future contaminated sites fall to the federal or Yukon governments, depending on the existence or licensing of relevant projects prior to or after devolution’s effective date, and other criteria.

The devolution agreement would not prejudice the rights and interests of First Nations in self government and land claim agreements. During the negotiations, key concerns of Yukon First Nations included protection of Aboriginal rights,

contaminated sites clean up, and forest management and fire suppression. These concerns were met through federal and territorial undertakings and various cooperative management and funding arrangements. An arrangement pre-dating the devolution agreement, the First Nations – Canada Program and Service Transfer Agreement, transferred resources from the Northern Affairs Program to Yukon First Nations, to assist the full implementation of their land claim and self government authorities. The Yukon Government agreed to top up the financial resources transferred to Yukon First Nations under the First Nations – Canada Northern Affairs Program on the effective date of devolution agreement. This was clearly a result of the leverage secured by First Nations because of the veto afforded to them by the Federal and Yukon Governments.

In anticipation of a resource royalty sharing agreement, Chapter 23 of the Umbrella Final Agreement (UFA) (1993) addresses the sharing of resource royalties. The chapter provides that First Nations may collect 50% of the Yukon government share of resource royalties (less any royalties received by First Nations), up to a cap of \$2 million, after which the First Nation share is 10%.

### **Indigenous Peoples' Governments**

According to Canada's 2001 census, in Canada's Northern Territories, Indigenous peoples are either minority or majority populations. Percentages of Aboriginal population are Yukon: 23%; Northwest Territories: 48%; Nunavut: 85%. "Indigenous peoples" includes Inuit, Inuvialuit, First Nation, and Metis peoples. Land claim agreements are constitutionally protected documents which recognize rights of Indigenous peoples and obligations of federal and territorial governments. In this sense land claim agreements are constitutional documents of the territories and significantly shape authorities of both Indigenous and territorial governments. The rights and authorities contained in the agreements recognize Indigenous governments' legal and political authority, establishing them as important partners in devolution and resource revenue discussions. Self government, and interim agreements and current negotiating processes, further enhance the basis of authority and necessity of indigenous peoples' representatives' participating in devolution and resource revenue discussions. In this paper, we use the term Indigenous governments and self governments. Indigenous governments refers to those organizations representing Indigenous people and their interests. In the NWT, self governments are institutions that may represent both Indigenous and public interests.

## **Northwest Territories**

The most recent round of devolution negotiations began during 2001, stalling in March 2005 due to Canada and the GNWT being unable to resolve issues over ongoing funding for lands and resource management responsibilities, and the revenue sharing arrangements. After a year-long hiatus talks between Canada and the GNWT began again during late 2006 with the appointment of Dr. Harvie Andre as Canada's Chief Negotiator, Dr. Hal Gerein as GNWT's Chief Negotiator, and Indigenous government representatives being invited to participate in March 2007. The NWT process differs from the Yukon experience in that Indigenous governments were involved in talks initially as one party through the NWT Aboriginal Summit, and beginning in 2007 as individual governments. Not all Indigenous governments have actively participated in negotiations, particularly those that have not yet settled land claim agreements (the Dehcho and Akaitcho governments have maintained observer status throughout).

The main elements of the devolution and resource revenue sharing deal include:

1. Transfer of the authorities, responsibilities, human resources, assets and ongoing funding of the INAC Northern Affairs Program to the GNWT (and possibly to Indigenous and self governments);
2. Transfer of land ownership and land management responsibilities from Canada to northern governments; and,
3. A resource revenue sharing agreement between northern governments and Canada.

The GNWT is anxious to ensure that Canada transfer adequate resources to support the devolved authorities and responsibilities, including one time and ongoing funding. With respect to revenues, the GNWT is seeking to ensure it controls the allocation of resource revenues for government programs and services.

Some Indigenous government key concerns include the following:

- The transfer of lands, land management authorities and jurisdictions, and revenues from Canada should not adversely impact recognized and unrecognized Aboriginal rights including self government rights;
- Resource revenue sharing arrangements must maximize the amount of resource revenues available to northern governments, and revenue sharing arrangements should provide a substantial share of resource revenues;

- Indigenous governments, particularly those with self government authorities, should receive shares of revenues to assist them in providing self government programs and services, taking into account that self government arrangements may include both Indigenous and public government responsibilities; and,
- Post-devolution implementation and intergovernmental arrangements should include meaningful participation of Indigenous governments.

With the prospect of the Mackenzie Gas Project, increased diamond mining activity, and increased exploration for oil, gas and minerals, the importance of reaching a devolution and resource revenue sharing agreement with Canada has taken on increased urgency. During 2006, Canada collected approximately \$270 million in NWT resource revenues. The GNWT does not receive a share of these revenues. Some Indigenous governments receive small shares of resource revenues through provisions in land claim agreements and interim measures agreements. Indigenous governments may reach Impact Benefit Agreements (or in the Inuvialuit region, Participation Agreements) with resource developers that may include monetary payments. These revenues are strictly for the benefit of land claim beneficiaries and, like all land claim benefits, not available for supporting public government programs and services or replacing government program funding. However, in future, Indigenous governments will gain self-government taxation powers and authority to levy fees contributing to own source revenue generation.

Currently, the GNWT is proposing to Canada that

- The GNWT will receive 50% of resource royalties generated in the NWT;
- A cap on these royalties (royalties not subject to offset) is as yet undetermined; and,
- Indigenous governments will jointly share in up to 25% of the net fiscal benefit of resource revenue sharing, and be eligible for additional revenue to support the delivery of provincial-like programs under self government.

## ***Nunavut***

Preliminary talks between Canada and the Government of Nunavut (GN) on devolution and resource revenue sharing began during 2004; these were essentially pre-negotiation talks. A federal negotiator, Paul Mayer, was appointed during December 2006. Along with Canada and the GN, Nunavut Tunngavik (NTI) is participating as an equal partner in devolution and resource revenue sharing talks. The Government of Nunavut is represented by negotiator Tony Penikett and NTI by Charlie Evalik. Similar to the agreements with the Yukon and NWT, the Nunavut talks will focus on the devolution of authorities over the

management of lands and resources in Nunavut currently the responsibility of INAC.

The GN is seeking the devolution of provincial-like powers over lands and resources, and a significant share of resource revenues. While the homogeneity of the Indigenous population in Nunavut, as compared with the other Territories, may promise a less complex process than that of the NWT or Yukon, potentially contentious issues in the Nunavut talks make their process no simpler than other devolution negotiations.

An important issue for the GN is control over internal waters; the Nunavut Government is seeking to benefit not only from land based resources but also those underlying the seabed within Nunavut's internal waters and Inuit traditional territories. The Nunavut offshore resources include oil and gas reserves valued at over a trillion dollars. In 1986, the Canadian government laid claim to the waters surrounding the Arctic Archipelago, citing Inuit land use and occupancy studies prepared as part of land claim negotiations to shore up its claims in answer to international objections to Canadian sovereignty over these waters. While a subsequent Supreme Court decision ruled that these waters were internal to Nunavut, Canada's current stance in negotiations is that Nunavut's boundaries stop at the shoreline, and do not extend to waters between the islands, waters which remain federal.<sup>xi</sup> This has the potential to limit the scope and extent of the authority the GN stands to gain, and may complicate the resource management regime in Nunavut, and the share of resource royalties resulting from the exploitation of seabed resources.

## ***Discussion***

The circumstances and stages of devolution in each territory are sufficiently different that it is difficult to apply common lessons learned. However, in each territory, common themes include the desire of territorial governments and Indigenous peoples seeking as much control as possible over resources, and that revenues remain in the North. However, being a territory, northern government positions seem to concede that available levels of control and resource sharing is far less than those levels enjoyed by provinces. All three cases strive to ensure that devolution enhances public government powers without adversely affecting Aboriginal rights and authorities. Common issues include options for resolving tensions arising between how territorial governments and Indigenous peoples will share in devolved powers and revenues, both at the negotiation and post-devolution management stages. What has been noticeably absent in devolution discussions between governments in all three cases, is public engagement and discussion in exploring ways that devolved powers and authorities might be harnessed to address social, cultural and environmental sustainability, including intergenerational equity.

Settled land claims are viewed as creating a more stable economic and political environment for devolution and resource revenue sharing negotiations. In the Yukon, the UFA (1993) was a catalyst for prompting devolution and resource revenue sharing agreements, with First Nations participating in devolution talks. There was some reluctance by First Nations without agreements to participate but the Yukon Government resolved these issues by reaching bilateral agreements with some of these First Nations and by resolving other issues in collaboration with the federal government. In the Northwest Territories, Indigenous peoples with land claim agreements have engaged in devolution talks, while those without agreements in most cases have been reluctant to engage, due to concerns that their processes might be prejudiced by devolution outcomes. While Nunavut's Indigenous interests are not fragmented as in the other two territories, difficulties with both the implementation of the GN and land claim agreement may complicate devolution talks.

Two lessons from the Yukon experience are particularly instructive. The first relates to the content of mirror legislation, and the second to the involvement of territorial governments in managing resource development. In the Yukon agreement, Canada required that "mirror" legislation substantively reflect federal legislation. This is a condition currently being contemplated in the NWT talks. Thus, while devolution presents an opportunity for change, there is also a strong federal interest, and industry interest, in maintaining continuity to promote economic stability. This is not necessarily good news for the owners of the public resources: the people, both Indigenous and non-Indigenous. Current federal royalty regimes require higher volumes of resource development to increase revenues; the requirement for mirror legislation having substantive conformity to federal legislation necessitates a future legislative change process on the heels of mirror legislation development, a time consuming and costly project.

The other lesson is instructive both for Indigenous peoples and territorial governments. Through the YOGA, the Yukon government both agreed not to approve activities on First Nation traditional territories without First Nation consent, and also legislated a role for the YTG in impact and benefit agreement (IBA) talks between First Nations and developers. First Nations have found that the YTG may take up opposing interests to theirs in negotiating IBAs, resulting in some negative experiences.<sup>xiii</sup> Without a positive working relationship, and as a result of situations where First Nations feel they have directly lost out on economic opportunities due to YTG interests being imposed in IBAs, some First Nations are less likely to approve oil and gas activities in their territories simply due to negative experiences, to the potential detriment of all parties.

## Resource Revenue Sharing

Resource revenue includes funds resulting from the collection of resource royalties and associate fees. At issue in devolution negotiations is determining the revenue split between Canada, territorial governments, and self governments; and, criteria regarding self governments' accessing resource revenues. Until territorial governments reach royalty sharing and devolution agreements, Canada receives resource royalties pursuant to federal legislation and regulations, and Indigenous governments receive a share of royalties as agreed in land claim agreements. Self government financing discussions anticipate self governments' sharing in resource revenues. Thus both territorial and Indigenous governments having or expecting to reach self government agreements are anxious to share in resource revenues.

However, one fundamental issue unaddressed in the context of resource revenue sharing negotiations is the royalty rates set for various types of resources. A recent Pembina Institute study looked at royalty regimes and taxes and fees on publicly owned resources in Canadian provinces, Alaska, and Norway in order to compare the public benefits resulting from, and sustainability of, resource exploitation.<sup>xiii</sup> A summary of some of the arrangements in four of the jurisdictions studied is included in Table 1. That study underscored both the opportunities and potential drawbacks of approaches to capturing different levels of resource rents from publicly owned oil, gas, and mining resources. While Canada both promotes and justifies the low level of royalties in the North as an incentive to development, the Pembina Institute report noted that in other jurisdictions, both higher royalty rates and special taxes and fees did not seem to discourage development.

### *The Royalty Regime...*

*One of the most competitive in the world!*

- *Low royalty payments while you recover your initial investment -- starting at 1%, rising by 1% every 18 months to a maximum of 5% until project payout*
- *Payout includes a fair rate of return on investment*
- *After project payout royalties cap out at the greater of 30% of net or 5% of gross*

*Source: INAC, Oil and Gas in Canada's North, as found May 08, 2007 at [http://www.ainc-inac.gc.ca/oil/bkgd/nor/index\\_e.html](http://www.ainc-inac.gc.ca/oil/bkgd/nor/index_e.html)*

Notably, the proponents of the Mackenzie Gas Project requested and received assurances from Canada during November 2005 that the royalty regime would be adjusted in a way that would be favorable to the MGP, that any devolution agreement in the NWT would include federal efforts to honor commitments in this regard made by Canada, and that no project-specific taxes would be leveled for the duration of the life of the project.<sup>xiv</sup> During the same month, the GNWT issued a similar letter of comfort to the MGP regarding the royalty regime.<sup>xv</sup> This example underscores a major issue for consideration: low royalty rates require high levels of resource development to achieve higher resource revenues. Introducing higher royalty rates, or employing other resource rent recovery arrangements such as resource development-specific taxes and fees could be instrumental in promoting sustainable and diversified development.

**Table 1: Comparison of Resource Revenue Capture Between Jurisdictions<sup>xvi</sup>**

	<b>NWT/NU</b>	<b>Yukon</b>	<b>Alberta</b>	<b>Norway</b>
Royalties	1%, rising by 1% every 18 months, to a maximum of 5% to project payout. After project payout, the royalty cap is 30% of net revenues or 5% of gross revenues, whichever is greater.	Draft regulations propose a range between 5% and 15% for the first 3 years, then 10% to 15% within a formula that accounts for market prices.	Variety of royalty rates for different types and grades of oil ranging from 24% to 40%; rates for gas account for market price and range from 15% to 35%	Royalties are being phased out.
Licenses	Highest bidder receives rights to specific land.	Bidders compete for rights let at 6-10 year term.	Bidders compete and participate in bonus bids, a voluntary payment based on expected value of excess economic rent.	Regulates the rights and duties of producers.
Territorial/ Provincial Income Tax	14%	15%	12.5%	
Federal Income Tax	28%, against which allowable deductions may be made	28%, against which allowable deductions may be made	28%, against which allowable deductions may be made	28%; and, an additional 50% tax is levied on the petroleum industry; operational costs are also allowed.
Other Revenue Sources or Deductions	IBA's – private deals between developers and Indigenous governments	Rents and leases generate small amounts of income (\$5 and \$1 per hectare respectively).	Oil sands royalty rates are 1% of gross project revenue until project payout; all operating and capital costs are 100% deductible.	A carbon dioxide tax is levied on production. State Directed Financial Interest in which the state has a share of investment and operating costs, and thus receives a proportion of returns. The state also has shares in Statoil, and receives dividends.

## Yukon Placer Mining Industry

### *Background*

Placer mining is the technique of recovering gold from gravel. Since the discovery of gold in the Klondike over 100 years ago, over 16.6 million crude ounces of placer gold have been produced — at today's prices that would be worth more than \$7 billion. Placer deposits occur in several areas in the Yukon, though historically, most placer mining has taken place near Dawson City. This area is also the traditional territory of the Tr'ondek Hwech'in.

The Devolution Transfer Agreement, which came into effect on April 1, 2003, transferred land and resource management powers, programs, and responsibilities in the Yukon from the Government of Canada to the Government of Yukon. Included in this transfer was the responsibility for the management of placer mining.

### *Net Fiscal Benefit*

In the Yukon Legislative Assembly, the 2003-2004 throne speech spoke to the impact of resource development on First Nations. The speech acknowledged that 'Yukon First Nations have experienced the impact of development while experiencing few of the economic benefits.' It goes on to say that 'It is time for First Nations to receive their fair share of economic benefits from resource development within their traditional territories'.<sup>1</sup>

The royalty regime developed by Canada was adopted in the Yukon's mirror legislation, a regime that significantly under-values gold. Canada's placer royalty regime, continued under the Yukon Government through mirror legislation, appears to be inadequate, when one works through the numbers: In 2005, 87% of the Yukon's placer gold was produced in the Dawson Mining District with production totaling 70,322 crude ounces (\$29.9 million)<sup>1</sup>. The royalty rate for placer mining is set at 2.5% of the value of gold, which is statically defined, and does not float with the market. If royalties had been tied to gold's market value, royalties of \$750,000 would have been paid. The current regime values gold at \$15.00 an ounce resulting in royalties of \$26,370.

Under Chapter 23 of the Umbrella Final Agreement, the Yukon must pay First Nations an amount equal to 50% of the first two million (that exceeds First Nation royalties) and 10% of any additional amount. The Tr'ondek Hwech'in portion of the First Nation share is approximately 9%. Therefore the First Nation received, at most, \$1,186. As a self-governing First Nation, the Tr'ondek Hwech'in receives its funding from Canada through a Financial Transfer Agreement that is very similar to Territorial financing agreements. Certain revenues, including resource royalties, are offset from the funding to be received from Canada. As this revenue is offset at the rate of 50% against the funding received from Canada to fund its Government, the net fiscal benefit was less than \$600. Since oil and gas royalties in the Yukon exceeded \$3 million in 2005, it can be argued that Yukon First Nations received only 10% these royalties resulting in the net fiscal benefit of placer royalties to Tr'ondek Hwech'in being \$118.00. This is the net fiscal benefit for the First Nation most impacted by placer mining.

## Intergenerational Equity

Territorial governments have reached a point where control over the nature and pace of economic development and important elements of fiscal policy are within sight. What remains to be seen is whether Canada and territorial governments will take substantive measures to address issues of intergenerational equity through their stewardship of non-renewable resource activity benefits.

Non-renewable resources cannot be replaced. Once extracted, they are gone forever. The principle of intergenerational equity adheres to the notion that future generations should share in the resource endowments benefiting current generations.<sup>xvii</sup> This is closely tied to sustainable development, a concept that has become increasingly salient as international bodies and national governments have begun to establish environmental and economic measures necessary to combat the unsustainable and damaging resource use practices of the developed and developing world. We know that the needs of future generations will include servicing the social, environmental, cultural, and economic costs inflicted by previous generations, and inflicted by our generation. We also know that sustainable options are open to us as northern governments contemplate increased control over economic development occasioned by devolution and resource revenue sharing agreements.

Setting aside revenues for future generations is not a new concept in the North: land claim governments have generally adhered to the principle of intergenerational equity as the basis for the financial management of capital endowments resulting from land claims. This principle results partly from Indigenous cultures' recognition of respect as a foundational value permeating all human interaction. Respect suffuses human relations, reaching backward and forward, anchored in the actions of the present that honor one's ancestors, future generations, community, lands and resources. Protecting both capital and resources for social, cultural, spiritual, and economic benefit of future generations is important. Income derived from claim settlements is currently invested in capital growth and in supporting a combination of activities addressing current economic needs and capacity building for the future, activity which has benefited both Indigenous and non-Indigenous northerners.

This is not to say that all land claim beneficiaries share equally in land claim and economic benefits or that the investment choices of Indigenous governments are always soundly sustainable. In fact, some business activities backed by Indigenous governments may run counter to the notion of sustainability, and may not always promote intergenerational equity. However, these governments demonstrate that sustainability and intergenerational equity are serious considerations in their decision making, and as shown in the following discussion

of impact benefit agreements, this can result in developing innovative and unique political and financial mechanisms contributing to fairness across generations.

Thus territorial governments have much to gain from the experiences of their partner Indigenous governments. For example, the Inuvialuit, endowed with an original \$45 million before repaying negotiating loans of approximately \$9 million, now have various business holdings based in northern and southern Canada valued in excess of \$300 million, employing over 1200 people, both Indigenous and non-Indigenous.<sup>xviii</sup> The Inuvialuit commitment to intergenerational equity is enshrined in the Inuvialuit Final Agreement under section 6.4(d): “Restrictions shall be placed by the Inuvialuit Regional Corporation from time to time on any financial distribution from the Inuvialuit corporations to encourage the preservation of the financial compensation for the future generations of Inuvialuit.” Significant resources are allocated to funding scholarships, skills development, and cultural activities.

Similarly, the tiny Vuntut Gwitchin community of Old Crow in the Yukon, renowned for its cultural strength and vitality, has established an investment trust for most of its land claim capital that has protected the funds from shortsighted expenditures. This arrangement has allowed for substantial capital growth and yet provides funding to support language, culture, education, youth, and elders initiatives. It has also provided seed money to allow its corporate entity to quietly develop an enviable real estate and business portfolio that includes a regional airline, and several other successful businesses. At the same time, community members have significantly reduced their reliance on government transfers, and land-based activities and culture-based livelihoods continue to thrive.

### **The Vuntut Development Corporation**

(Incorporated 1999)

#### *Mission Statement*

The Vuntut Development Corporation (the ‘Corporation’) is in business as a for-profit economic force participating in, planning for and facilitating the creation of successful business ventures for Citizens of the Vuntut Gwitchin First Nation. The Corporation aims to balance economic development and the natural environment while respecting the traditional lifestyle and culture of the Vuntut Gwitchin. The Corporation Board is committed to be responsible and fair in making decisions and will ensure accountability to its shareholders through effective communications. The Corporation will assist individuals and businesses to succeed. The Corporation will play a major role in the creation of a diversified, balanced, and sustainable economy in the North Yukon, an economy that provides prosperity and certainty for the future for all Vuntut Gwitchin.

Source: <http://www.vuntut.com>

These success stories arose in part from the successful negotiation of difficult political, cultural, and economic choices that a commitment to sustainability and intergenerational equity require. In the case of Indigenous peoples, a strong adherence to cultural values and practices creates a political climate generally supportive of those choices, as well as a keen awareness of the central importance of fate control in the wake of experiences suffered as a result of colonization. The importance placed on intergenerational equity issuing from a combination of cultural values and negative experiences of external control has positioned emerging self governments to devise policies with a long term view similar to those adopted by land claim organizations.

The cultural values of Indigenous peoples are universally recognizable in principles informing concepts such as sustainable development and fairness across generations. Needs of the present must be balanced with the needs of the future, taking into account the excesses of both past and present. Those excesses, which have contributed to creating environmental, economic, and human capacity deficits, must be figured into projecting current and future needs. The following sections provide ideas and options for policy choices toward intergenerational equity.

## **Non-Renewable Permanent Funds and Impact Benefit Agreements**

### **Non-Renewable Permanent Funds**

Non-renewable resources such as oil, gas, and minerals are subject to frequent volatile market fluctuations beyond the control of national or territorial governments. Social, environmental, and human health costs and impacts are associated with non-renewable resource extraction. Some countries virtually awash in oil such as Saudi Arabia, have realized profits that have been effectively harnessed to ensure intergenerational equity. Jurisdictions with smaller resource bases have opted to achieve intergenerational fairness and sustainability by establishing Non-renewable Permanent Funds (NPFs).

Norway, Scotland, Alaska, and Alberta, are jurisdictions that have amassed considerable wealth in funds that can be used in ways that lessen dependence on non-renewable resources as economic drivers, and thus help ensure that generations beyond the current one can benefit from resource extraction. NPFs are a way to provide an element of stability to revenue streams and provide governments with alternative fiscal policy options for promoting economic development, ranging from decreasing taxes to individual dividends, or establishing educational or infrastructure development funds. NPFs can effectively protect against the boom-bust economic cycles inherent to dependence on non-renewable resources. NPFs are established through resource royalties from

non-renewable resources such as oil and gas. Usually, 15%-30% of royalties collected have been contributed to the funds yearly on an ongoing basis, or over a set period of time.<sup>xix</sup> It should be noted that despite the benefits promised by NPFs, not all NPFs have been managed in ways that achieve optimal results, and some might argue that the stewardship of NPFs could be improved.

It is important to note that jurisdictions such as Alaska, Norway, and Alberta can afford to make contributions to NPFs as their share and volume of resource rents allow for royalty portions in the tens to hundreds of millions of dollars each year. Critical to their success has been choosing to levy a combination of royalties, taxes, and fees capturing a significant part of the available non-renewable resources' economic rent. Economic rent is the difference between the value of the resource and the cost of producing the resource, allowing for a reasonable profit margin. Economic rent varies not only between type of resource, but according to other factors, so that the economic rent of oil for example in one jurisdiction, could vary between oil fields. Comparisons between Canadian and international jurisdictions show that jurisdictions such as Norway and Alaska consistently collect more economic rent from non-renewable resources than Canadian jurisdictions do. While the available resource rents may vary between Canada and other jurisdictions, the superior economic rent capture is directly resulting from mechanisms of government policy choices, including taxation, fees, royalties, and partial ownership of resources.<sup>xx</sup>

## **Impact Benefit Agreements**

Impact Benefit Agreements (IBAs) are another instrument that can promote intergenerational equity. IBAs have become commonplace throughout the North where resource extraction companies seek to do business in the traditional territories of Indigenous peoples. IBAs may include a variety of components, addressing commitments made by extraction companies with respect to key issues such as environmental management, cultural heritage protection, rights and interests in land, financial payments, employment and training, and business development, Indigenous consent and support for the project, and implementation measures.<sup>xxi</sup> The NWT government has also negotiated similar socioeconomic agreements with diamond mining companies BHP Billiton and Diavik Diamonds to further define its role in relation to monitoring socioeconomic impacts of diamond mining on affected communities.

Often, compensatory components of IBAs are tied directly to the lifecycle and nature of a resource project, principally focusing on employment and training. In an explicit departure from that pattern, the Tlicho government secured an IBA with the DeBeers Snap Lake project during March 2006 which focuses on cultural development rather than strictly business and employment opportunities.<sup>xxii</sup> In this sense the Tlicho reconceived the purpose and role of impact benefit agreements, in line with Tlicho cultural values, and experiences of impacts of previous IBAs.

According to one Tlicho official, the idea for a cultural focus arose from the recognition that the lifestyles and preferences of some Tlicho would in practice exclude those members from ever enjoying meaningful IBA benefits. The Snap Lake IBA explicitly supports those Tlicho who wish to continue to practice their own culture and land-based way of life.<sup>xxiii</sup> As a result, a practical expression of the Tlicho emphasis on the importance of culture and a respect for different individual choices broadened the instrumental and material utility of the IBA from a tool serving interests shaped primarily by the project and its impacts, to a tool serving the long term interests of the cultural wellbeing of the Tlicho people.

This emphasis stands as another example of an Indigenous government's commitment to balancing the economic and cultural needs of its members and conceives of intergenerational equity in terms beyond a capitalist economic view. Focused support for cultural development through the IBA speaks to the value of culture's enduring importance for both present and future. But this is not to say that other components of IBAs cannot assist in creating a framework for intergenerational equity. In fact the opposite is true. However, as noted by Ciaran O'Faircheallaigh in analyses of Australian IBAs, and similar to the situation with land claim and other agreements, the strength and value of IBAs lie not only in their content, but the robustness of their implementation.<sup>xxiv</sup>

## Yukon Oil and Gas IBAs

### *Background*

The Canada-Yukon Oil and Gas Accord came into effect November 1998 transferring administration of and legislative jurisdiction over oil and gas in the Yukon. Resource royalties were a component of this transfer.

Oil and Gas royalties have ranged from lows of \$2.1 million in 1999 to over \$4 million in 2005. Draft royalty regulations to modify and modernize the royalty regime were developed in October 1999 but have not been put into effect. Yukon First Nations receive a share of the royalties as set out in Chapter 23 of their Final Agreements.

In addition to royalties, Yukon First Nations and their citizens receive benefits from oil and gas development through increases in business activities, training and employment opportunities. These opportunities are to be addressed in benefits agreements.

### *Benefits Agreements*

There was a time when companies involved in oil, gas and mineral development activities undertook these activities with little First Nation involvement and rarely made agreements with First Nations. With the increased definition of First Nation rights through litigation and settlement agreements, companies have begun to engage First Nations in discussions. Impacts and benefits agreements (IBAs) have become the norm, providing companies with an avenue to generate support for their projects. IBAs allow First Nations to mitigate adverse environmental and social impacts that tended to slip through regulatory cracks, and to partner with companies to maximize benefits. In the past, Territorial or Federal Governments were not party to these benefits agreements.

Section 68 of the *Yukon Oil & Gas Act* requires benefits agreements to be in place in order for oil and gas activities to occur where it is anticipated the activities will cost more than \$1 million in any 12-month period. Two of the parties to the agreement are as expected, the licensee and any Yukon First Nation in whose traditional territory the activity will be carried out. The Yukon Government legislated itself a role as the third party to a benefit agreement. Should there be an impasse in negotiations of a benefits agreement for activities on non-settlement land (over 90% of the Yukon land base), the Yukon Government can sign an agreement with the licensee and it is deemed that the First Nation consents. The Yukon Government has taken positions that tend to oppose First Nations in the area of resource development and the benefits that flow from them.

In 2000 and 2001, Anderson Resources Ltd. entered negotiations with the Vuntut Gwitchin First Nation, the First Nation of Na-cho Nyak Dun and the Yukon Government with the goal of concluding a benefits agreement. Exploration activities were to occur in an area that would most affect the First Nation communities. One goal of the First Nations was to address certain impacts that tend not to be picked up in regulatory approvals. The company was agreeable to this but the Yukon Government was strongly opposed to this. It was stated that provisions like this would be a disincentive to exploration and development. Although this was resolved in favor of the First Nations and company's preference, it took sustained political involvement to get there. The same issue was resurrected by the Yukon Government in future negotiations.

With respect to economic benefits including employment and training, the position of the First Nations was that the benefits should accrue to them and to the affected communities. The position of the Yukon was that the benefits should accrue to all Yukoners. It was therefore difficult to conclude a benefits agreement with provisions necessary to provide real local benefits. The Yukon Government was facing pressure from businesses located throughout the Yukon and would therefore not support provisions that would give local businesses any advantage over other Yukon companies or even companies from outside of the Yukon. One concern of the Yukon Government included the fear that any provisions that might result in higher operating costs would be a disincentive to exploration and development activities. Another concern was the potential undermining of their political support base.

Cooperation in resource development is difficult when the desired outcomes may be inconsistent, in part or in all, and where there is a power imbalance. It is also difficult when a party wears many hats. The Yukon Government is the major promoter for oil and gas exploration, is party to any benefits agreements, and is the regulator responsible for permitting and enforcement.

## Considering Policy Options for Promoting Fairness Across Generations

It is clear from the circumstances in the three territories that federal interests determine to a large extent the shape of devolution and resource revenue sharing agreements. The federal government's interests are informed by national politics and priorities, and there are good arguments to be made supporting federal involvement ensuring national interests are served in the north. It is evident from previous discussion that these interests are rooted in a combination of current considerations and long-established policy decisions. These interests include maintaining some authority over current royalty regimes, providing incentives to resource developers toward promoting economic development in the national interest, and maximizing federal shares of resource revenues. These interests are not always aligned with those of territorial governments, which seek to maximize northern control over resource development – and thereby the economy – along with maximizing territorial resource revenue shares.

While Indigenous governments echo territorial interests, additional interests include actively seeking a meaningful role in post-devolution resource management, and sharing in resource revenues at a level that will enable them to effectively discharge self government and public government responsibilities. Moreover, the track record of Indigenous governments' management of resources and business interests, and approaches to revenue generation instruments such as IBAs evidence a commitment to both sustainability and intergenerational equity, from which both the federal and territorial governments could draw lessons.

If devolution and resource revenue sharing are to effectively contribute to increased northern control of resources and economic development over the long term, innovative policy options must be considered. Such options would address the interests of all governments operating in the North, including Indigenous governments, and the northern and national public over the long term. Elements of innovative policy options could include the following:

1. A federal and territorial commitment to review royalty regimes in a way that would involve stakeholder consultation and take into consideration changes in the markets since the royalty regimes were initially established that may have affected optimum percentage of resource rents available for capture;
2. A meaningful role for all northern governments in making adjustments to royalty regimes;
3. Establishing an orderly process among northern governments for royalty regime adjustments;

4. Obtaining commitments from Canada and northern governments to support establishing a Northern NPF supported wholly by resource revenues, without decreasing the net fiscal benefit to the territories with respect to royalty sharing, and instead funded through financing arrangements;
5. Consideration of currently unaccounted costs such as the needs of future generations, the cost of social and environmental impacts, and costs of climate change impacts in determining royalty rates and revenue sharing formulas;
6. Introduction of tax and fee regimes enabling the people as owners of the resource to benefit along with resource developers when market prices result in profit spikes; and,
7. A meaningful role for Indigenous governments in post-devolution resource management. This is an important element of promoting a cooperative and stable regulatory and policy climate as a basis for sustainable resource management promoting intergenerational equity.

These elements, while not exhaustive, are considerations promoting the design of policy options that account for the importance of both intergenerational equity and sustainability.

## About the Authors

**Stephanie Irlbacher-Fox** was raised in Inuvik, NT. She holds a BA and MA in political science from the University of Alberta and a PhD from Cambridge University, England. Stephanie has spent the last decade working for Indigenous peoples' governments in the NWT on self government and devolution negotiations, and related community development processes; over the past five years her personal interest in Dene culture has led to developing competence in Dene moose hide tanning. A political anthropologist, Stephanie is an Adjunct Professor at the Canadian Circumpolar Institute, University of Alberta, and a Research Associate at the Steffansson Arctic Institute, Iceland. She lives in Yellowknife.

**Stephen J. Mills** is Vuntut Gwitchin from Old Crow, Yukon. He holds a BA in business administration and is a trained mediator. He has been a negotiator and advisor to various Yukon and NWT First Nations for fifteen years in areas including self government, devolution, economic development, agreement financing and implementation, and socioeconomic assessment. He currently serves as an Executive Committee Member of the Yukon Environmental and Socio-economic Assessment Board, President of the Vuntut Development Corporation in Old Crow, Yukon, and is currently negotiating Impact and Benefits Agreements for two First Nations. Stephen is also an avid hunter and maintains a trap line in his family's traditional territory. He lives in Whitehorse.

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## Endnotes

<sup>i</sup> This paper draws on both research and the experiences of the authors who have worked as part of negotiating teams on NWT and Yukon devolution, self government, and related negotiations respectively. The authors also wish to acknowledge the helpful comments on earlier drafts provided by James Stauch, Walter and Duncan Gordon Foundation; Dr. Gabrielle Slowey, York University; Dr. Elana Wilson, Norsk Utenrikspolitisk Institutt, Denmark; and Anthony Hodge, Anthony Hodge Consultants.

<sup>ii</sup> Intergovernmental Panel on Climate Change, *Global Warming 2001*, p. 26.

<sup>iii</sup> See in particular Glomsrod, Solveig and Iulie Alaksen, 2006.

<sup>iv</sup> For a thorough overview of impact benefit agreements in the NWT see Bielawski , 2004.

<sup>v</sup> According to the Mackenzie Gas Project (MGP) web site: “The proposed Mackenzie Gas Project is expected to create thousands of short-term jobs over three winter sessions during the peak construction period. About 45 to 55 long-term employee jobs are forecast for pipeline and related [*sic*] facilities operations. In addition, there may be 35 to 45 contractor jobs associated with the overall Project operations activity.” As found May 07, 2007 at <http://www.mackenziegasproject.com/opportunities/employment/index.html>. This description does not account for secondary or spin-off economic activity, or activities related to developing new gas fields, however, this is MGP’s own description of the permanent employment benefits that will be expected associated with the pipeline operation itself.

<sup>vi</sup> For example, criticisms aimed at industry by social advocacy groups during environmental review hearings on the BHP diamond mine during the late 1990s and during the Joint Review Panel Hearings of the Mackenzie Gas project have criticized the intense work schedules for both construction and production, which are meant to maximize shareholder returns on investment, arguing for example that less intense production approaches could extend the life of projects and promote longer term employment and economic benefits. See for example O’Reilly (1997) as found May 07, 2007 at <http://www.carc.org/pubs/v24no1-4/mining.htm>. Monitoring issues have been somewhat mitigated in the case of diamond mines, for example, by the establishment of agencies such as the Environmental Monitoring Agency, after significant concerns were raised over the capacity of government to monitor operations and impacts during the construction and operation phases. However, it was not until 2007 that the Mackenzie Valley Environmental Impact Review Board was able to establish socioeconomic impact assessment guidelines, a full decade after diamond mines were first proposed. These are not issues confined to the North, for example see “Environmentalists seek to halt oil project”, The Canadian Press, March 31, 2007 Source: Permafrost Media Digest April 02, 2007, Vol.2, #209. For a detailed discussion of the impacts of mining on Indigenous communities, see Gibson and Klinck (2003).

<sup>vii</sup> See for example statistics for individual NWT communities as of 2006 as reported by the NWT Bureau of Statistics, as found May 07, 2007 at [http://www.stats.gov.nt.ca/Profile/Sum\\_ofNWTCommunity%20Stats.pdf](http://www.stats.gov.nt.ca/Profile/Sum_ofNWTCommunity%20Stats.pdf)

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- <sup>viii</sup> See Taylor *et. al.*, 2004; also see Canadian Arctic Resources Committee (2005).
- <sup>ix</sup> The tar sands have been criticized for extensive environmental impacts particularly the use of water, which has become a source of concern for peoples such as the Dehcho First Nations. See “Dehcho leader calls for tar sands moratorium”, February 02, 2007, as found May 08, 2007:  
[http://www.polarisinstitute.org/deh\\_cho\\_leader\\_calls\\_for\\_tar\\_sands\\_moratorium](http://www.polarisinstitute.org/deh_cho_leader_calls_for_tar_sands_moratorium)
- <sup>x</sup> According to the Yukon government, the new royalty guidelines dating to 1999 but have yet to be enacted, “Yukon is developing its royalty regulations and is planning to adopt an ad valorem royalty system. The proposed base oil and gas royalty is 10 per cent, with increases to a maximum rate in accordance with a price sensitive formula. A five per cent royalty rate is proposed for an initial period of production.” As found May 07, 2007 at [http://www.emr.gov.yk.ca/oilandgas/fiscal\\_regime.html](http://www.emr.gov.yk.ca/oilandgas/fiscal_regime.html).
- <sup>xi</sup> See Paul Okalik’s speech “Devolution and Nation Building in Canada’s North”, speech to the Public Policy Forum Seminar on Economic Transformation North of 60, Ottawa Ontario. December 13, 2006.
- <sup>xii</sup> See textbox further on in paper “Yukon Oil and Gas IBAs”.
- <sup>xiii</sup> Taylor *et.al.*, 2004
- <sup>xiv</sup> Correspondence from Deputy Prime Minister Anne McLellan to VP Resources of Imperial Oil, Mr. Randy Broiles, November 2007 and as reported by CBC North radio, November 17, 2006 as found at <http://cbc.ca>.
- <sup>xv</sup> Correspondence to Imperial Oil Ltd from Premier Joe Handley and Finance Minister Floyd Roland, November 16, 2005.
- <sup>xvi</sup> Source: this table is based on information from the appendices to Taylor *et. al.* 2004; and, Bergner and Storoski 2006.
- <sup>xvii</sup> See Hartwick, 1977.
- <sup>xviii</sup> “Vision + Leadership = Success: Salute to the Inuvialuit on the 20<sup>th</sup> Anniversary of the Inuvialuit Final Agreement”, Native Journal, October 20, 2004.
- <sup>xix</sup> For a thorough discussion of NPFs see Taylor *et. al.* 2004.
- <sup>xx</sup> See Taylor *et. al.* , Executive Summary.
- <sup>xxi</sup> For an excellent discussion of these components and criteria for evaluating agreements see O’Faircheallaigh in Langton *et. al.* 2004, pp 303-328.
- <sup>xxii</sup> “Tlicho Nation and DeBeers conclude impact agreement for Snap Lake Project”, DeBeers Canada Press Release, March 30, 2006, as found May 08, 2007 at [http://www.debeerscanada.com/files\\_2/index\\_news-release\\_033006.html](http://www.debeerscanada.com/files_2/index_news-release_033006.html)
- <sup>xxiii</sup> Personal communication with Tlicho official, April, 2006.
- <sup>xxiv</sup> O’Faircheallaigh, 2004, p.307

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