

Northwest Territories: the federalism within



NWT Economics and Politics

- ❑ ~43,000 people over 1.17million sq km, in 33 communities that range in size from 55 (Kakisa) to 20,000 (Yellowknife).
- ❑ higher per capita income, but also higher accommodation, energy, and food prices.
- ❑ diamond mines, public sector, service/retail, subsistence.
- ❑ employment rates: non-Aboriginal (81%), Aboriginal (51%).
- ❑ 19 member territorial legislative assembly under consensus system.
- ❑ completed land claims
 - Inuvialuit (1984), Gwich'in (1992), Sahtu (1994), Tlicho (2003)
- ❑ outstanding claims
 - Dehcho, Akaitcho, NWT Metis
 - in addition to regional and community self-government claims.
- ❑ 11 official languages: e.g., un territoire aux voix multiples; ᐃᓄᐱᑦ ᓃᓐ ᓃᓐ ᓃᓐ ᓃᓐ...ᐱᓄ.; Atausiq nuna, inugiaktut uqallausiit.

NWT Political Development

How might a territory of 43,000 people, 33 distinct communities, 11 official languages and numerous cultural, social and political viewpoints share a vision for governance?

Peter H. Russell (1977) in *Dene Nation: the colony within*:

“[Cartier] inspired the establishment of a federal system of government guaranteeing the rights of certain minorities within new major units of the new federation....Creating the institutions of this new mode of government and making them work has been a major challenge of Canadian statecraft.”

Peter H. Russell (2009) at Northern Governance conference in Yellowknife:

“Since Aboriginal peoples in the territory have negotiated or are negotiating self-government agreements, the overall structure of the territory is bound to be federal, combining self-government of regions and peoples with shared government for providing services for the territory as a whole. ”

Self rule plus shared rule?

Is federalism a viable model to protect rights, address nationalism(s), and support good governance in the Northwest Territories?

Federalism and Rights

Theory

□ Kymlicka (1996) sees the value of federalism in a multicultural polity where minorities constitute the majority within a federal sub-unit and can make decisions in certain policy areas without being outvoted by the overall majority.

Analysis

Most Aboriginal peoples in the NWT –Tlicho, Dehcho, Gwich'in, Inuvialuit – constitute a majority within their regional boundaries. However, non-beneficiary citizens within these boundaries, regardless of ethnicity, are excluded from sub-unit representation and services unless a public government model is employed.

The Akaitcho territory significantly overlaps with the territory of the NWT Metis Nation as well as the majority non-Aboriginal population in Yellowknife.

A territorially-based federal system could protect rights established through claims, but it is not clear if one could devise a set of regional governments with exclusive jurisdiction *and* minimal territorial overlap.

Federalism and Nationalism

Theory

- ❑ Lijphart (1999): federalism is a mechanism to recognize and institutionalize difference.
- ❑ Horowitz (1993): federalism is a mechanism to blur and transcend difference.
- ❑ Pildes (2008): federal systems (with clear separations of power) can mitigate against divisive competition for resources / power at the centre.

Analysis

Some measure of 'intrastate federalism' is already recognizable in the NWT. For example, regional balance is often reflected in the composition of the Executive Council of the GNWT. This is remarkable under the consensus system where ministers are elected by all members, not selected by the First Minister.

A measure of 'open federalism' may never be achievable because municipalities in the NWT – as future self-governments – are federal creatures.

A separation of powers is already being determined through self-government negotiations and Intergovernmental Service Agreements (ISAs).

Top-Down or Bottom-Up?

If we accept that federalism would enable the protection of rights and sufficiently addresses nationalism(s), how might federalism emerge in the NWT?

Martin Papillon (2008) distinguishes between two distinct approaches, top-down and bottom-up.

Top-Down - Constitutionalism

- formal arrangement to establish a division of powers and the nature of relationships between sub-units and the central government

Alexander Hamilton in *Federalist #1* (1787): “...to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force.”

Bottom-Up - Governance

- everyday practices of governance that embrace the federal principle

Daniel Elazar in *Exploring Federalism* (1987): “...the essence of federalism is not to be found in a particular set of institutions, but in the institutionalization of particular relationships among the participants in political life.”

Constitutionalism: the concept applied

This approach is built on the assumption that an overarching constitutional vision should be arrived before society can meaningfully answer corresponding questions about governance.

Provincial constitutionalism

The concept of sub-national or provincial constitutions may be a useful frame through which to consider the potential application, in a formal way, of the federal principle in the Northwest Territories.

Some confusion exists over what constitutes a provincial constitution. British Columbia is the only province with a *Constitution Act*. Other jurisdictions point to executive council acts or elections statutes.

The *Northwest Territories Act* has been recognized as the NWT constitution in case law (e.g., *Morin v. Crawford*, 1999) as well as by constitutional scholars (e.g., Funston, 2004).

The territory's 'constitution' is an act of Parliament and therefore can only be amended through federal legislation. This differs considerably from the provincial concept where section 45 of the *Constitution Act* (1982) reads:

“Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.”

Constitutionalism: as it stands

Northwest Territories Act (R.S.C. 1985, c. N-27)

Legislative powers [*inter alia*]

16. The Commissioner in Council may, subject to this Act and any other Act of Parliament, make ordinances for the government of the Territories in relation to the following classes of subjects:

- (a) direct taxation within the Territories in order to raise a revenue for territorial, municipal or local purposes;
- (d) election of members of the Council and controverted elections;
- (p) intoxicants;
- (t) generally, all matters of a merely local or private nature in the Territories;
- (v) such other matters as may be designated by the Governor in Council.

Agreement implementation Acts

17.1 Despite section 17 [i.e., no powers greater than those of a province], the Commissioner in Council may, in exercising the powers of the Commissioner in Council under section 16 for the purpose of implementing the Agreement, as defined in section 2 of the *Tlicho Land Claims and Self-Government Act*, make ordinances that are in relation to the matters coming within class 24 of section 91 of the Constitution Act, 1867.

Constitutionalism: potential interest?

Dene Nation (2010)

“If the Dene Nation is successful in its recent push to design, by 2015, a constitution for the territory that would replace the Northwest Territories Act, the NWT would be only the second jurisdiction in Canada, after British Columbia, to develop a written constitution below the federal level.” (May, 2010)

Charlie Furlong, Gwich'in Council (2010)

“We must work together and look at the unique circumstances of aboriginal [sic] and public governments in the NWT and likewise develop a unique form of governance of the NWT with equal powers of a province [sic].”

Floyd Roland, Premier, Government of the Northwest Territories (2010)

The Premier launched ‘Creating Our Future’ as a series of consultations that will culminate in a meeting of the Northern Leaders Forum, consisting of 6 territorially based Aboriginal bodies, the Metis Nation, the NWT Association of Communities, two regular Members of the Legislative Assembly, and the Premier.

“Northern leaders are taking a variety of approaches to engage their constituents. The Premier is mindful and respectful of these regional processes and is engaging specifically with broad representative groups ...”

Constitutionalism: analysis

Reasons

- The NWT Act is dated. Funston asserts: “The Constitution Act, 1871, is still the constitutional source of authority for the Acts which Parliament has passed to provide for government in the territories.”
- As new self-government agreements are completed, new provisions must be grafted onto the existing *Act* to make it relevant. This makes for messy legislation.
- It may not be possible to accurately reflect modern concepts, such as the inherent right to self-government, in legislation that originated in the 19th century.

Risk

- Constitutional fatigue. Northerners have participated in constitutional debates at various points during the past two decades, and may think that resources could be better spent on transportation, education, and employment.
- Factions can deepen. The case of Canada proves that it may be better to leave well enough alone, because, as Simeon warns, constitutional processes can cause “the intensification of normal politics.”

Governance: the concept applied

This approach is built on the belief that governance relations can be articulated through day-to-day practices absent an entrenched formal statement or vision.

Caribou Reference

The decision by the GNWT this past spring to withdraw the reference question to the Supreme Court of the NWT on jurisdiction over caribou management may have been motivated by several reasons, but ultimately signalled a willingness to arrive at policy through political means rather than through a constitutional arbiter.

Intergovernmental Service Agreements (ISAs)

In the case of the Tlicho self-government arrangement, the Tlicho, GNWT and Canada have entered into a 10-year ISA that describes how certain programs and services will be delivered and who will be responsible for what aspect of service delivery – from street-level bureaucracy to standard setting.

Interim Measure

Some Aboriginal groups in the NWT have expressed a reluctance to enter into constitutional talks until all land claim and self-government agreements are complete. In many ways, this means that a bottom-up and possibly asymmetrical set of relationships is the default approach until all parties are willing to consider an alternative approach.

Governance: as it stands

Land claims and self-government agreements may have a status independent of government, and appear to rank higher in the constitutional order than territorial governments (Funston, 2004).

Inuvialuit Final Agreement (1984)

s. 3(3) The Settlement Legislation approving, giving effect to and declaring valid this Agreement shall provide that, **where there is inconsistency or conflict** between either the Settlement Legislation or this Agreement and the provisions of any other federal, territorial, provincial or municipal law, or any by-law or regulation, the **Settlement Legislation or this Agreement shall prevail** to the extent of the inconsistency or conflict.

Inuvialuit Self-Government Process (current)

s. 4(3) Canada agrees that where restructuring of the public institutions of government is considered for the Western Arctic Region, the Inuvialuit shall not be treated less favourably than any other native groups or native people with respect to the governmental powers and authority conferred on them.

Governance: separation of powers

Inuvialuit Process – Negotiation Subject Matters

- gov't structures, internal constitutions, elections, leadership selection processes
- Accountability and procedures of gov't bodies
- Legal status and capacity of governing bodies
- Inuvialuit citizenship
- Language and culture
- Local government operations
- Education K-12
- Post-secondary education
- Early childhood and out of school care
- Training
- Social services
- Income support
- Health services
- Child and family services
- Adoption
- Marriage
- Guardianship, trusteeship, wills and estates
- Housing
- Administration of justice and policing
- Industrial relations, occupational health&safety, labour standards and employment equity

- the application of federal and territorial human rights legislation
- the use, mgmt, control, admin. And protection of Inuvialuit Settlement Lands
- Inuvialuit heritage resources
- the application of Inuvialuit laws in the Inuvialuit Settlement Regional outside of the Western Arctic Region
- economic development
- tourism
- financial agreements and own source revenues
- Intergovernmental relations
- Transition of municipal corporations
- procedures for the review and amendment of the Final Agreement procedures for the ratification of the Final Agreement
- constitutional protection and legal status of the Final Agreement
- dispute resolution
- the issue of consistency of Inuvialuit laws and actions with the international legal obligations of Canada

Governance: analysis

Reasons

- A federal arrangement may already be taking shape as a result of the separation of powers that result from self-government negotiations and Intergovernmental Service Agreements.
- This approach may be more consistent with the political philosophy of Aboriginal Canadians as well as the history of Canadian statecraft; as John Ralston Saul has argued: “Learning to live with complexity and uncertainty is all about reinventing social tension as positive...complexity is a strength and authority must be used in a spirit of minimal impairment.” (2008)

Risks

- Uncertainty can lead to the intensification of seemingly minor jurisdictional disputes, because they become more symbolic absent pre-determined authority.
- The absence of a formal constitutional arrangement may threaten unity if there is no underlying rationale to the notion of the Northwest Territories as a community.

Federalism within the NWT?

- Although a regional government structure is emergent, it is not clear if there could be a complete set of regional governments with exclusive jurisdiction *and* minimal territorial overlap. After all claims processes are completed, the geography of these final agreements may not support a federal structure.
- If compromise could be found in cases of territorial overlap, balanced regional representation in central institutions and a separation of powers – core federal principles – are already part of the NWT political culture.
- The results of self-government negotiations and Intergovernmental Service Agreements could delineate a separation of powers prior to arriving at any formal constitutional vision.
- NWT leaders appear willing to find a mechanism that allows for governance cooperation.