

Nunavut to take control of Crown land within territory following devolution agreement with Canada

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On January 18, 2024, Canada, Nunavut and Nunavut Tunngavik Inc. (NTI) (collectively, the parties) signed the *Nunavut Lands and Resources Devolution Agreement* (the Agreement). The Agreement transfers control of Crown lands in the territory to Nunavut, effective April 1, 2027 (the Transfer Date). The Agreement represents the final handover of decision-making authority for land, water, mines and minerals in Canada's northern territories and the culmination of the transition of authority over Nunavut that began in 1993 with the Nunavut Land Claims Agreement (the Nunavut Agreement).

NTI is the representative entity that coordinates and manages the rights and responsibilities of the Inuit peoples of Nunavut under the Nunavut Agreement. It also has specific responsibilities under the new Agreement to implement devolution activities between January 2024 and April 2027.

This Update provides a brief history of devolution in Canada's northern territories, reviews the critical terms of the Agreement and offers our predictions for how the Agreement may impact resource development in Nunavut.

Devolution in Canada's territories

Devolution is the transfer or delegation of power and responsibility from the federal government to a territorial government. While responsibility over other aspects of government, such as healthcare and education, have been gradually transferred to northern territorial governments since the 1960s, the devolution of jurisdiction over territorial land and resources is a more recent development. Yukon and the Northwest Territories (NWT) gained responsibility for and control over territorial land and resources in 2003 and 2013, respectively, after signing similar devolution agreements with the federal government.

Nunavut's devolution process commenced in 2014 with several years of negotiations between the parties. The parties signed a non-binding agreement in principle in August 2019, which triggered a five-year timeline for them to negotiate the Agreement.

The Agreement

On the Transfer Date, Nunavut will take over administration and control of the land and inshore waters within Nunavut's boundaries as described in the Nunavut Act. The devolution will be implemented through a series of changes to federal and territorial legislation that will come into force on the Transfer Date.

In addition to the changes discussed below, the Agreement will require amendments to several pieces of federal legislation, including the Canada Petroleum Resources Act, the Canada Oil and Gas Operations Act and the Canadian Energy Regulator Act. Nunavut is required under the Agreement to enact territorial legislation that substantially mirrors these Acts before April 1, 2027.

Impact assessments

After the Transfer Date, the eight-member Nunavut Impact Review Board (NIRB) established under the Nunavut Agreement will continue to assess the potential impacts of proposed projects as per the Nunavut Planning and Project Assessment Act (NuPPAA), subject to changes which include

- changes to the NIRB's composition to facilitate greater decision-making power for Nunavut
- increased powers for Nunavut to appoint members of the Nunavut Planning Commission and the Nunavut Water Board
- transfer of the functions of the responsible federal Minister under NuPPAA to a territorial Minister

The Canada Energy Regulator (CER) will maintain the same regulatory functions in Nunavut as it currently has in all other provinces and territories after the Transfer Date. It will also serve as the primary regulator for petroleum resources in Nunavut for five years following the Transfer Date. Following that, Nunavut will have the option to establish a different regulator for petroleum resources or to renew the CER's jurisdiction for subsequent five-year terms.

The Agreement contemplates that the parties will enter into a separate agreement for the management, decision making and sharing of revenue resources relating to offshore petroleum resources, which are reserved to Canada under the Agreement.

Existing rights and interests

The Agreement will not affect any land or water rights or interests that exist immediately prior to April 1, 2027, including access orders, permits, licences, authorizations, leases, agreements for lease or sale, renewals, replacements and successor rights or interests.

Future territorial legislation can only cancel, suspend or limit existing rights or interests if (i) prior to April 1, 2027, the right or interest could have been cancelled, suspended or limited in identical circumstances or (ii) the cancellation, suspension or limitation is for a failure to comply with a condition of the right or interest.

Indigenous consultation, title and rights

The Agreement will impact how the duty to consult operates in Nunavut. The duty to consult

arises when contemplated Crown conduct (including a decision to issue project approvals) may adversely affect an Aboriginal right or title. Following devolution, land-use decisions in the territory will be made by the Nunavut territorial government, instead of the federal government, which means that the territorial Crown will be charged with the duty to consult when it arises.

The Agreement sets out specific requirements for consultation that differ when NTI or another party is the party being consulted. However, the requirements — such as notice “in sufficient form and detail”, the provision of a “reasonable time period” for a party to prepare its views on a matter and “full and fair consideration of any views” presented by the party — are vaguely defined. All of these are likely to require judicial interpretation.

The Agreement specifies that it will not derogate from (i) existing modern treaties, land claim agreements or self-government agreements or (ii) Aboriginal or treaty rights. Similarly, the federal government will retain the right to administer or control lands and water rights where necessary to (i) settle or implement Indigenous land claims, settlement agreements, treaties or self-government agreements or to (ii) fulfill Aboriginal or treaty rights.

Resource revenue

The Agreement does not specify how the parties will share revenue derived from resource development. Instead, negotiations for a revenue sharing agreement will begin upon Nunavut's request. The Agreement contemplates that Nunavut may impose a specific tax on the exploration, production and development of minerals that is separate from and in addition to corporate income tax and royalties, licences, rentals or other fees related to the exploration, production and development of minerals in the territory.

Implications

The devolution of control over Nunavut's land and resources will have implications for resource development in the territory. Nunavut will be responsible for land-use planning in the territory (together with NTI) and will be able to make decisions that align with its objectives and priorities for the territory. As Nunavut develops land-use legislation, the impacts of devolution on resource development will become clearer.

Devolution may signal a spike in resource investments in Nunavut, as it has in other territories. For example, a short two years following the NWT devolution agreement, year-over-year private-sector capital expenditures in the territory increased by 25.9%, driven largely by a 40% increase in expenditures in the mining and oil and gas sectors. The Gahcho Kué diamond mine (which, at the time of its construction, was the largest diamond mine in the world) was a significant driver of this growth, with construction completed between 2013 and 2016. Similarly, exploration expenditures in the Yukon increased sharply in the years following devolution — from \$6.9 million in 2002 to \$140 million in 2007 — and development investments saw a corresponding increase, rising from \$32.5 million in 2002 to \$200 million in 2009. Similar opportunities may arise in Nunavut in the next few years as the territorial government looks to stimulate its economy through resource revenue sharing agreements.