

**LEGISLATIVE ASSEMBLY OF THE
NORTHWEST TERRITORIES
6TH COUNCIL, 38TH SESSION**

TABLED DOCUMENT NO. 21-38

TABLED ON JANUARY 30, 1969

Tabled on Jan 30, 1969

OWNERSHIP OF NORTHERN NATURAL RESOURCES - HOME RULE
FOR THE TERRITORIES?

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INTRODUCTION

The place is Ottawa, the scene is a committee room in the East Block of the House of Commons, the speaker is the Chairman of the Standing Committee of the House on Indian Affairs and Northern Development, Mr. Ian Watson, M.P. for La Prairie, a constituency south of Montreal. The date is Thursday, December 5, 1968. I quote:

I would like to say initially that one point which I think we all recognize now and which unfortunately very few Canadians realize, is that the natural resources of the Northwest Territories and the Yukon belong to all Canadians as distinct from the natural resources of each of the provinces, and in this natural heritage we all have a joint interest. Every Canadian citizen, no matter whether he is a Quebecker or a British Columbian, has an equal interest in these resources.

- (1) Minutes of Standing Committee on Indian Affairs and Northern Development, Dec. 5, 1968, p. 213.

These words, ladies and gentlemen, are the words of the imperialist speaking about his colonies! They might have been spoken by conquistadors in Spanish America, by seigneurs in New France or by viceroys in India. To one who calls the north his homeland, these are fighting words - words that violate the northerners' birthright and provoke his passion. But note that I speak dispassionately. I'm not a northerner. I was born in Manitoba and now reside in Alberta, and during my life I have lived in the Maritimes and in Toronto. I'm one of those provincialists to whom Mr. Watson offers

the prospect of national unity through plunder - what better way for Canadians to forget their grievances and settle their disputes than to join in sharing the spoils of the northern treasure house. But I'm not taken in. I'm skeptical by nature and a lawyer by training, and on both counts, I'm inclined to examine even a gift horse in the mouth. I'm also a university professor, and therefore must seek objectivity through careful analysis and dispassionate conjecture. Finally, I know I'm a moralist - despite being a lawyer - and therefore have certain values which will shape my judgments.

Having exercised my skills of analysis, delving into historical, legal, constitutional, and moral considerations, and even into economic and pragmatic considerations, I cannot but conclude that ownership and control of natural resources in the Yukon and Northwest Territories must pass to the governments of these territories as a pre-condition of self-government. No scheme for continuing control of these resources by the federal government after the Territories gain provincehood can be justified. It would scorn the lessons that history teaches, violate the rights that the Canadian constitution provides, and flaunt the precepts which modern international law and morality ordain. Not only that, but continued ownership and control by the federal government would not even be in the interests of sound resource management.

In speaking so broadly and unequivocally against continued federal ownership and control of resources in the Territories, I owe it to you to demonstrate my objectivity more plainly than merely by identifying myself as a lawyer and a teacher used to

being impartial. I'm not anti-Ottawa. In my published writing of the past few years I have been an advocate of exclusive federal jurisdiction over the offshore minerals, and I'm pleased that the decision of the Supreme Court of Canada and the political settlement offered by the federal government to the provinces mean that exclusive management of the offshore areas will remain in Ottawa, for in this case the relevant factors clearly favour federal control. I'm also an admirer of those in Ottawa who now administer the mineral resources of the Territories.

I refer to Dr. Woodward, Chief of the Oil and Mineral Division, and to Mr. Digby Hunt, the former Chief and now Director of the Development Branch of the Department of Indian Affairs and Northern Development. I recently appeared before the Standing Committee of the House of Commons on Indian Affairs and Northern Development to criticize some aspects of the oil and gas regulations which they administer, and I may now be advocating that one day their job be moved from Ottawa to Yellowknife, but I would also be the first to advocate that they move with them!

Tonight, I want to review the arguments for and against transferring resources to the Territories. Because most of you are already convinced that the Territories must gain control of resources, my review shall be brief. Besides, there are more important considerations for the moment. I want your time and your attention to impress on you two things - first, that the question of ownership and control of northern natural resources is an urgent question right now!; second, that right now must begin a study of practical means for transferring control to the Territories. I will place some proposals before you tonight.

THE ARGUMENTS FOR AND AGAINST TRANSFERRING RESOURCES
TO THE TERRITORIES

History repeats itself - sometimes like a broken sound track! From the time of the Constitutional Act of 1791, which established Canada's first legislative assembly after the cession of Canada to Great Britain, until the Act of Union of 1840, - a period of 50 years when a system of responsible government was evolving for the colony of Canada - an increasing and oftentimes bitter conflict grew over control of natural resources. Colonists demanded that the Governor answer to the colonial assembly for his dispositions of Crown lands. The conflict was summed up in a report by Charles Buller to Lord Durham that the Crown lands were "in name the property of the Crown, and under the control of an English minister; while the Assembly claimed that the administration of the crown lands ought to be entrusted to ministers responsible to the Assembly, and that revenue arising therefrom ought to be under the control of the representatives of the people". Substitute "Council" for "Assembly" and there's a familiar ring to this claim. But it was made in 1838, not 1968, and it was granted by the Act of Union, 1840.

In 1852, by the Imperial statute 15 and 16 Vict. c. 39, this claim, won by the Canadian colonists, was given formal recognition throughout the British colonies. The statute of 1852 declared that all "monies arising from the sale or disposition of the lands of the Crown in any of Her Majesty's colonies or foreign possessions" would no longer accrue to the consolidated revenues of Great Britain. The Colonial Office would say, when dealing with the surrender of Rupert's Land by the Hudson's Bay Company in 1869, that "It is clear that colonists of the Anglo-Saxon race look upon the land revenue as legitimately belonging to the community."

Accordingly, when responsible government was granted to the Australian colonies, to New Zealand and to Newfoundland, the arrangement took the form of a grant by Great Britain of full rights over the lands in exchange for the colony undertaking the duties and obligations of self-government .

This ordering of affairs was quite naturally continued at Confederation. The British North America Act, 1867, provided, by s. 109, that each of the four confederating provinces, Upper Canada, Lower Canada, New Brunswick and Nova Scotia, would retain ownership and control of its natural resources. When British Columbia joined Canada in 1871, it was taken for granted that it would retain its natural resources. The principle was carried so far that the stumbling block which kept Prince Edward Island out of Confederation until 1873 was the fact that all its lands had been alienated in earlier times by the British governor of the colony, and Prince Edward Island would not come to terms until it was agreed that Canada would pay the new province a sufficient sum of money to enable it to buy back its lands from absentee British owners. Again, when Newfoundland entered the Dominion as a province in 1949 it kept its land and mineral resources.

This principle, then, comes down to modern times. It is history only because its roots go deep. It is today's fact, too, for Canada is a confederation of provinces whose people are politically organized on a regional basis, and each region, excepting the Territories, does in fact own and control its natural resources.

When history's lesson is taught for a century and a half, it's not lightly to be ignored!

But I've spoken of history repeating itself like a broken

record. There seems some inconsistency here, and I must explain. For, while there is an unbroken stream of experience from 1840 until today establishing that a self-governing region shall control its natural resources, this experience has not always proceeded without conflict and exception.

When Rupert's Land was acquired from the Hudson's Bay Company in 1868 and a new province was proposed, the Red River colonists contended for control of resources. But the issue of land scrip mollified the inhabitants, and the Manitoba Act, 1870, declared that in the case of this newly-formed province, the land resources would belong to Canada "for Dominion purposes". When Alberta and Saskatchewan were formed as provinces in 1905, natural resources were again kept under federal control. These precedents reaped bitter years in the beginnings of the prairie provinces - years that leave a residue of prairie chauvinism which manifests itself today when issues of national unity arise. This bitter feeling toward the imperialism of eastern Canadians finds expression in writings of the times - I refer to A. Branley-Moore, writing-in 1910. His title is "Canada and Her Colonies or Home Rule for Alberta". I also refer to Chester Martin's book "The Natural Resources Question", published in 1920 as an official study for the Province of Manitoba. I have borrowed heavily from this work, which pleads Manitoba's case fifty years after formation of the Province for transfer to it of ownership and control of its natural resources. This book profoundly affects me because of its political and moral implications. Canada's disunities today are built on inequities of yesterday. I cannot lightly bear the thought that one day the northerner will condemn me, a southerner, for fifty years of exploitation of the resources he rightfully considers his own. I

do not want to hear the northerner of the future say of the Territories, as Chester Martin had to say of Manitoba, that the years which followed provincehood were the most humiliating in its history. I quote: "The province struggled courageously under financial responsibilities which, despite an economy verging upon abject parsimony, were utterly beyond the powers of the Provincial Treasurer to meet from the resources at his disposal." I cannot believe that Canadians, who are today so conscious of the need for national unity, can callously contemplate the prospect that northerners will one day take up the chorus of disunity because we abuse their birthright today.

It was not until 1930 that Ottawa transferred natural resources to the prairie provinces. Now the same issues present themselves for the Yukon and North West Territories. The same arguments are raised, the same depth of feeling is generated, and, I believe, the same ultimate result is inevitable. It is for these reasons that I speak of history's broken record repeating itself. If we were to learn from history, we Canadians would now declare recognition that natural resources belong to the Territories, and we would now plan to transfer them from federal to territorial ownership and control.

But I must broaden the inquiry. Does this principle of regional control of resources have any broader force than merely being an historic precept of British colonialism? Does it have application to the Territories at this moment of time? What lay behind the exception to the principle in the case of Manitoba and in the cases of Alberta and Saskatchewan, and why shouldn't this exception pertain to the Territories now?

The answer to the first question I have posed is that sovereignty over natural resources by the people of any region is today recognized as a precept of international law derived from the resolutions of the United Nations. I will quote from Resolution No. 1803 (XVII) of December 14, 1962. This resolution contains the declaration that:

...the rights of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations....

That this right is intended to be afforded, not merely to states as technical and legal entities, but to peoples as inhabitants of a recognizable geographic region, is clear in the writings of international lawyers and jurists. Therefore, one must conclude that the long-established precedent of British colonialism whereby the inhabitants of a self-governing region are given control of their natural resources is today recognized as a precept of international law, applicable to all peoples everywhere who can assert a right to self-government.

My second question was whether this principle is now applicable to the Territories. The answer is, of course, yes! The test is whether the inhabitants are now self-governing or can claim the right to self-government in their regional affairs. Upper Canada and Lower Canada were still colonies in 1840 when control of Crown lands was given to the legislative assemblies, and their legislative assemblies exercised jurisdiction similar to that now exercised by the legislative councils of the Yukon Territory and of the Northwest Territories. The only reasons for delaying transfer of control at this time must be reasons of practicality if they are to be consistent with the principle, for the Territories are now self-

governing in their regional affairs.

I shall consider these practical questions in a moment. But first, one of my earlier questions remains to be answered. It concerned the exception made in the case of the prairie provinces, and asked why this exception should not apply to the Territories.

Many arguments were advanced to justify the retention by the federal government of ownership of prairie lands when the prairie provinces were formed, but analysis, in retrospect, shows only one of these to have merit, and that argument has no application to the Territories today. Sir John A. Macdonald justified the retention of land resources from Manitoba in 1870 as necessary to fulfil the "Dominion purposes" of building a transcontinental railroad and colonizing the prairies. Canada's destiny as a nation was then by no means assured. The building of the railroad was beyond the financial resources of the nation, and Americans, pushing up from St. Paul, posed the threat that the nation never would be established from sea to sea. Westerners can accept the fact that their land resources underwrote the creation of a nation, but no similar Canadian destiny is at stake in the north. To suggest, as some Canadians do, that Canadians will solve their problems of disunity by joint venturing to exploit the minerals of the north is to debase the concept of national unity, and the suggestion is not worthy of consideration. There is no parallel in the case of the prairie provinces that justifies retention of resources from the Territories.

At this point, may I sum up by repeating what I said earlier - that historic, legal, constitutional and moral considerations all lead to the conclusion that natural resources should now be transferred to the Territories. I mentioned economic and pragmatic

considerations as well, and said that even sound resource management would be served by the transfer of resources from federal control to the Territories.

From an economic viewpoint, all will concede that exploitation of resources is the key to viable provinces in the north. Without resource revenues, self-government in the Territories is an illusion. From a pragmatic viewpoint, never was political man more aware than he is today of the damaging and costly effects of inequities, discriminations, and second-class citizenship in the make-up of his society. Pragmatic politics require that there be no second-class regions in Canada.

So far as sound resource management is concerned, and whether it will be better served by a territorial administration than by a federal administration, I can only offer my conjecture, asking you to receive it as being informed and sincere. Last summer I made a comparative examination of the petroleum lands policies of the State of Alaska and of northern Canada, asking myself such questions as which administration, a federal one such as Ottawa, or a regional one such as Alaska, would give greater emphasis to such matters as the raising of revenues, the nationality of the developer, and the conservation of the environment. I presented my conclusions to the 19th Alaskan Science Conference in Whitehorse last August, and my paper is now being published along with those given by Mark de Weerdt and by Professor David Quirin to provide a spectrum of views on northern mineral policies. Briefly, my conclusions were that a regional administration would likely be more zealous than a federal one in raising revenues from the mineral resources and more concerned about the care and conservation of the environment. To the federal government in Canada the administration of the

northern resources is the preoccupation of merely one of several divisions of one of several branches of one of several departments. Decision-making lies buried in a complex organizational structure, and there is danger that it will not be capable of adequate response once oil operations pass from the stage of filing and issuing permits in the land office to the stage of extensive exploratory and development work in the field. To a regional administration in the Territories, the management of mineral resources would be a matter of first importance, meriting as it has in Alberta, the closest attention and care of senior government leaders.

Federal administrations tend to be sidetracked by policies which have nothing to do with resource management, however much they may be justified for their own sakes. I have had some experience with s. 55 of the Canada Oil and Gas Land Regulations - the one that restricts the granting of leases to Canadian citizens, to Canadian corporations 50% of whose shares are beneficially owned by Canadians, and to Canadian corporations whose shares are listed on a stock exchange. If the policy is desirable, it should be applied to all resources, and not just to oil, and to all parts of Canada, and not just to the north, and it ought to be applied so it will work, and not so as to provide merely a sop to nationalistic sentiment. I can tell you that it has had little, if any, significant effect by way of increasing the Canadian content in foreign-owned companies that do comply with s. 55 by "going public" and getting listed on a stock exchange, but that it has kept investment out of the north by foreign private companies, whose shareholders will not resort to the expedients required to conform with the requirement. I know that the Territorial council is on record as favoring investment in the

north from all comers, and that it has urged the repeal of s. 55. To those many Canadians who are seriously concerned about the extent of foreign ownership in the extractive industries, I would advise you to look at a current map of oil permit and lease holdings in the north. There my point will be demonstrated that s. 55 does not prevent domination of the northern oil lands by the great foreign-owned, international oil companies, including not only the American, but the French, British and other European companies as well. If you will look to the Arctic Islands, you will find 50,000,000 acres designated "Panarctic". This company represents predominantly Canadian capital, including a 45% shareholding by Canada. It is this positive kind of approach that brings capital in, rather than the negative approach of s. 55 which keeps capital out, that will bring a better balance into the investment pattern in Canadian resources.

Now I may sum up my point. No territorial administration would find its efforts hampered by such a provision as s. 55, for no territorial council would pass such legislation. This section is but one example. Ottawa, with many claims to satisfy and interests to compromise, cannot bring as direct and forceful management to bear as can a regional administration, whose aims are clear and compelling.

I conclude the case for transfer of natural resources to the Territories by saying that even economic and pragmatic considerations support it, as well as do considerations of sound resource management.

PRACTICAL STEPS TO TRANSFER RESOURCES TO THE TERRITORIES

I said earlier that I wanted to impress on you that now is the time when practical steps must be taken to transfer resource control to the Territories. Northerners must recognize that the

decision is not theirs to make. It is always the lot of people in newly-emerging political regions that decisions are made by others. But only they can present the case, and only they can impart a sense of its urgency. The case for territorial control of resources must be taken to all Canadians, and its appeal must be carried to the conscience as well as to the mind. For Canadians are being asked to surrender the prospect of great riches in exchange for little else than the moral satisfaction of knowing that northerners will gain the opportunity of full and equal participation in the Canadian federation. Like all human beings, those in southern Canada will find it easier to make a generous response to this moral claim when its cost is low, and easier still when it's uncertain whether any cost is attached at all. At this moment, the resources of the north are largely unknown. They lie in the realm of expectation, and the cost of their surrender is a speculation. Now Canadians may answer to the dictates of their consciences. But soon, five years, or ten years from now, wealth may be pouring in from the north, and then the cost of transferring resources to the Territories will be real and demonstrable. Some federal politicians offer this future wealth to the provinces as the answer to their chronic deficiencies in revenues so that they can meet their growing responsibilities in health welfare and education. Should the provinces now be prepared to support the case for territorial control, would they remain so if revenues from northern oil and other minerals were pouring into provincial coffers?

There is another factor that contributes an aspect of urgency to the question. When the prairie provinces finally gained control of their natural resources in 1930, theirs was largely a pyrrhic victory, for during the fifty years of federal control, most of the prairie lands had passed into private ownership. Only the

accident of delayed discovery of oil left a wealth of resources in provincial hands. Now the pattern of mineral resource ownership is being established for the Territories. Already, substantially all of the sedimentary areas of the north are held under federal oil and gas permits and leases, and the federal regulations provide few mechanisms for altering this pattern. Northerners have had no say in the making of these regulations. When natural resources are transferred, the territorial administrators will inherit this pattern of petroleum ownership, for rights acquired under the existing regulations must continue to be recognized. The point is that the longer the transfer of resources is delayed, the less the opportunity will be for territorial policies to play a significant part in their development. It will be like receiving a present of whiskey only to find when the wrapping is taken off, that the bottle is cracked and most of the whiskey has seeped away.

If I have impressed you by the urgency of the matter, may I conclude by considering what might be a practical program for transferring resources to the Territories.

The first step has already been taken. On November 20, 1967, the Council of the North West Territories, on a motion by David Searle, passed by the unanimous vote of the councillors, resolved that:

"the Commissioner make representation on behalf of this Council to the appropriate federal authorities requesting that the federal government acknowledge its role as a trustee of natural resources for the future province of the North and establish guidelines for a proper accounting of that trusteeship when same comes to a close (when the province of the North comes into being) coupled at that time with a transfer of ownership of said mineral resources to said province of the North."

In the two sessions of the Council since November, 1967, the councillors reaffirmed this motion, and pressed Ottawa for a

response. No answer has yet been received.

The Council will continue to demand an answer from Ottawa. Maybe it can now put forward steps that will give reality to the trusteeship and to the ultimate transfer of resources.

Will you permit me to suggest the kind of steps that might be taken? These proposals are aimed at giving the trusteeship concrete form and outlining the procedures by which the trusteeship should be transformed into a transfer of resources to the Territories.

First, as to the form of trusteeship, it should manifest the federal role as that of trustee in a clear and tangible way, and it should provide for participation by the territorial administration in the management of the trust. One straight-forward way to accomplish these goals is to establish a "Northern Natural Resources Commission" under the auspices of both a statute of the federal Parliament and an ordinance of the territorial Council. This Commission would be given responsibility for the administration of natural resources such as is now vested in the Department of Indian Affairs and Northern Development. The Commission would be independent of both the federal civil service and of the territorial civil service, and therefore would have a clear identity as a trustee.

The statute and the ordinance would provide that, whether the Commission be comprised of three or five members, the majority would, at the outset, be appointed by the federal government and the minority by the territorial council, so that there would be territorial participation in the Commission's work. The Commission would be given the authority to make regulations governing the administration of natural resources. It would be politically responsible to the respective federal and territorial governments through the appointed commissioners, who likely would be men of such rank as deputy minister or territorial councillor.

The Commission would lay annual reports before both the federal Parliament and the territorial council. It would finance its operations, including the salaries of its officers and employees, from the revenues received from natural resources, including royalties. The statute and the ordinance would provide that the remaining revenues would be paid over in shares to the respective governments, the federal government share being intended to recoup it for its investment of public funds attributable to the development of northern natural resources. Probably a 50%-50% split would be fair at the outset, giving northerners a reasonable future prospect of fiscal ability to become a self-governing province, and other Canadians a fair chance of recovering their investment. In time, the federal share would be phased out.

Such a Commission finds precedent in many facets of resource development, and it's not a strange concept for the north. In Alberta there is an Oil and Gas Conservation Board which serves as an agency independent of government to regulate the oil industry. Many American states have state land commissions. In my investigation, I examined the California statute under which the California State Land Commission is organized, and found that it would provide some helpful analogies. Northerners are familiar with the Northern Transportation Company, a Crown corporation, and with the Northern Canada Power Commission, each an agency administering an important segment of the territorial economy.

With the establishment of such a Northern Natural Resources Commission, it would be less difficult to transform the trusteeship into a transfer of resources when a province is formed. It could now be provided in the statute and in the ordinance that, upon provincehood being attained, the federal appointees on the Commission

would retire, and the Commission would thereafter operate under the territorial ordinance until the ordinance should become a statute of the new province.

Such a Commission could provide the flexibility and efficiency that is so necessary once the pace of exploration and development quickens. From my experience with the petroleum industry, I know that rapid and energetic response is required from the government, not only in the field, but also in the minister's office and in the legislature as well. A Commission, with a simple structure for decision-making and with authority to make regulations, could provide this response. It could also deal flexibly with the problems of transition. It could begin its operations in Ottawa, and gradually transfer them to Yellowknife, under a mandate to complete the transfer within a certain number of years. It could begin with surface lands and then extend its jurisdiction to include minerals, forests and wildlife as such steps should become feasible.

Obviously, the transfer of administration of natural resources involves the Yukon Territory as well as the North West Territories. Probably the Commission should begin under the auspices of the Yukon Territorial Council as well, and should include Yukon appointees. Then the Commission would be charged with the task, like the amoeba, of splitting itself so that there would ultimately be two commissions, one for the Yukon and one for the Northwest Territories. Maybe the experience with the joint Commission would be so successful as to persuade the people of the Yukon and of the Northwest Territories to continue a joint administration of some aspects of resource management so as to attain a more efficient structure of government.

CONCLUSION

I've been told that, because it so seldom happens, northerners love to receive advice from outsiders! Those of you who agree with my main thesis will know what steps are now practical, if any, and will give to my proposals whatever consideration they merit, which may be none at all! But I'll not stop offering advice. I'm going to close this lecture on a philosophical note, and it will include some words of advice, but this time you'll forgive my presumption, for I'll not be speaking to you as a southerner to a northerner, but as one Canadian to another.

It is altogether too easy, in presenting the arguments for and against transfer of resources to the Territories, to lose sight of the fact that we're all Canadians. The arguments are so often made as if northerners and the rest of Canadians were dealing at arm's length, with none but antagonistic interests at stake. When we stop to think, we know that this crisis ^{of} confrontation is not the whole story. All Canadians now benefit and will benefit from northern development, whichever government owns and administers the resources, and all northerners are Canadians, benefitting from the continuing well-being of Canada. What, then, should the guidelines be? Maybe it's easier to say what they should not be. They should not include a paternalism which fails to yield to northerners the same chance to make mistakes and earn successes as other Canadians have had. They should not include a balance-sheet approach, which counts the dollars spent in the north and calculates a return on the investment as would a Shylock. They should not include an uninformed sentiment that pushes northern development without regard to conditions and costs. They should not include a northern chauvinism that would hoard the mineral riches to itself.

These guidelines should proceed from a premise that all Canadians are entitled to an equal status in the political institutions that mould their country, with the result that northerners must be given regional self-government on an equal footing with other Canadians. These guidelines should also include the premise that all Canadians contribute to the national well-being, with the result that richer regions of the country must contribute to the wealth and opportunity of poorer regions.

Finally, these guidelines must recognize that natural resources are just what the name implies - nature's bounty, and nature has strings attached - terms and conditions that are more inflexible and inexorable than any laws of man. They are the terms, which, if violated by thoughtless and unrestrained exploitation, bring reprisal through ravaged and unproductive environments. My final word of advice is that northerners take nature's terms and conditions into account, and tend their environment well, so that the northern wilderness of forest and stream will not be transformed into the southern wilderness of pollution and blight.