Legislative Summary **LS-408E**

BILL C-33: NUNAVUT WATERS AND NUNAVUT SURFACE RIGHTS TRIBUNAL ACT

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LEGISLATIVE HISTORY OF BILL C-33

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	20 September 2001	First Reading:	22 November 2001
Second Reading:	27 September 2001	Second Reading:	27 November 2001
Committee Report:	31 October 2001	Committee Report:	21 March 2002
Report Stage:	2 November 2001	Report Stage:	25 March 2002
Third Reading:	2 November 2001	Third Reading:	26 March 2002

*** Message sent to the House of Commons: 26 March 2002**
*** Concurrence in Senate Amendments: 16 April 2002**

Royal Assent: 30 April 2002

Statutes of Canada 2002, c. 10

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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TABLE OF CONTENTS

Page

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BILL C-33: NUNAVUT WATERS AND NUNAVUT SURFACE RIGHTS TRIBUNAL ACT*

BACKGROUND(1)

Bill C-33, An Act respecting the water resources of Nunavut and the Nunavut Surface Rights Tribunal and to make consequential amendments to other Acts (the Nunavut Waters and Nunavut Surface Rights Tribunal Act), was introduced in the House of Commons on 20 September 2001. The bill implements provisions of the 1993 *Nunavut Land Claims Agreement* relating to the management of waters and to the creation of a Surface Rights Tribunal for the newly created territory of Nunavut, established 1 April 1999. On 31 October 2001, the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources – to which Bill C-33 was referred – reported it back to the House of Commons with amendments, including one significant amendment in relation to ministerial authority over licence approval. The bill was adopted by the House of Commons without further amendments on 2 November 2001, and introduced in the Senate on 6 November 2001. **On 21 March 2002, the Standing Senate Committee on Energy, the Environment and Natural Resources reported Bill C-33 back to the Senate with one amendment deleting the legislation's non-derogation clause, and with Observations. The Senate adopted Bill C-33 without further amendment on 26 March.**

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* Notice: For clarity of exposition, the legislative proposals set out in the Bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) This document is based, in part, on a Legislative Summary prepared in 1999 by Jill Wherrett, formerly of the Political and Social Affairs Division, and Mary Hurley, on Bill C-62, predecessor legislation to Bill C-33 that died on the *Order Paper*.

A. General

In 1977, the Inuit Tapirisat of Canada (ITC) initiated the largest comprehensive land claim in Canadian history. The claim involved over 1,900,000 square kilometres of the central and eastern Northwest Territories, as well as adjacent offshore areas, and creation of a new political territory called Nunavut. The ITC subsequently agreed that the creation of Nunavut would be dealt with apart from the comprehensive claims process.

In 1982, the Tunngavik Federation of Nunavut (TFN) replaced the ITC as the negotiating body for the Inuit. In 1990, the TFN, the Government of the Northwest Territories and the federal government reached an Agreement-in-Principle (AIP), with the Final Agreement on major elements of the land claim concluded late in 1991.

Article 4 of the Final Agreement, entitled "Nunavut Political Development," was pivotal to the conclusion of Nunavut land claim negotiations. It committed Canada to the creation of the Nunavut Government and Territory, following negotiation of a political accord on timing, process and substantive issues. In October 1992, subsequent to a successful plebiscite on the principle of dividing the Northwest Territories, the Nunavut Political Accord ensuring the creation of Nunavut by 1999 was signed.

In November 1992, approximately 70% of the eastern Arctic Inuit ratified the Final Agreement. The *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* was signed by federal, territorial and TFN representatives in May 1993. Under Article 2.2.1, this Nunavut Land Claims Agreement (the Agreement) "shall be a land claims agreement within the meaning of section 35 of the *Constitution Act, 1982*." Article 4 stipulated, however, that neither the Political Accord nor legislation enacted in accordance with it would form part of the Agreement, or benefit from section 35 protection as a land claim agreement.

The Agreement establishes the Nunavut Settlement Area that covers approximately 2,000,000 square kilometres, or roughly one-fifth of Canada's land mass. It provides for financial compensation of $1.14 billion, to be paid to the Nunavut Trust for the Inuit over a 14-year period, and Inuit ownership of 350,000 square kilometres of land within the Nunavut Settlement Area, including mineral rights over approximately 10% of these 350,000 square kilometres. In return for these and other guarantees set out in the Agreement, the Inuit agreed to the extinguishment of their Aboriginal title to lands and waters anywhere in Canada or adjacent offshore areas within Canadian jurisdiction or sovereignty.

Federal legislation to ratify the Agreement (the *Nunavut Land Claims Agreement Act*[2]) and to establish the Nunavut Territory on 1 April 1999 (the *Nunavut Act*[3]) received Royal Assent in June 1993. The *Nunavut Land Claims Agreement Act* came into force on 9 July 1993, completing the process for ratification of the Agreement. Also in 1993, responsibility for implementing Inuit obligations under the Agreement, and for ensuring on behalf of the Inuit of Nunavut that governmental signatories to the Agreement fulfil their respective obligations, passed to Nunavut Tunngavik Incorporated (NTI), the successor organization to TFN.

B. Nunavut Land and Resource Management Institutions

The Agreement sets up structures with responsibilities and authority in the Nunavut Settlement Area in matters of wildlife, land and resource management and environmental protection. Pursuant to Article 5, the Nunavut Wildlife Management Board (NWMB) was established as an "institution of public government" on the date of ratification of the Agreement. Articles 11-13 further provide for the creation of the Nunavut Planning Commission (NPC), the Nunavut Impact Review Board (NIRB) and the Nunavut Water Board (Board). Article 21 provides that a Surface Rights Tribunal (Tribunal) must be established if requested by a prescribed Inuit organization, or may be established as an initiative of Government.

Sections 10.1.1 and 10.2.1 of the Agreement stipulate that, unlike the NWMB, the other institutions identified "shall be established by legislation" and "[a]ll [their] substantive powers, functions, objectives and duties … shall be set out in statute." Under the Article 10 timetable, the Tribunal would be set up by or before "six months after" the Agreement's ratification date, while the NPC, the NIRB and the Board would be established by or before the second anniversary of that ratification.

Section 10.10.1 provides for the contingency that the required legislation might be delayed. It states:

> Where the legislation to establish any of the institutions referred to in Section 10.1.1 is not in effect by the first anniversary of the date specified for their establishment,

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(2) S.C. 1993, c. 29 (R.S.C. 1985, c. N-28.7).

(3) S.C. 1993, c. 28 (R.S.C. 1985, c. N-28.6). This Act has been amended by S.C. 1998, c. 15, and by S.C. 1999, c. 3.

> (a) in respect of the Tribunal, the Minister shall appoint persons as members of the Tribunal; and
>
> (b) in respect of NIRB, the NPC or the NWB, the provisions of the Agreement respecting the appointment of the members of that institution shall be considered to be in effect on that anniversary date,
> and
> upon their appointment, those members shall be considered to have, for all purposes of law, all the powers and duties described in the Agreement.

In the absence of federal legislation to meet the schedule at Section 10.1.1, the four institutions in question have been exercising the "powers and duties described in the Agreement" since 1996. Notwithstanding this reality, Section 10.10.3 of the Agreement also provides that "[g]overnment may, at any time, re-establish in the manner provided for in [other Parts of Article 10], any institution established under Section 10.10.1."

The federal government has taken the position that the Agreement obliges it to constitute the Board and the Tribunal by way of legislation, notwithstanding their up-and-running status.(4) In his Second Reading speech in the House of Commons on 26 September 2001, the Minister of Indian Affairs and Northern Development (the Minister) outlined the benefits he saw in the bill:

> The certainty created by the act will encourage investment. These institutions will ensure that residents of Nunavut have a say in decisions about the use of water resources, the deposit of wastes and access to lands throughout the territory. Their role will be to balance the interests of many stakeholders while ensuring protection of the fragile Arctic environment. They will operate with fairness, openness and integrity based on known and consistent rules.

The Minister went on to say:

> Bill C-33 would provide clear mandates for the water board and surface rights tribunal and certainty for all stakeholders in Nunavut; certainty of access for the resource industries, certainty in water licensing processes and certainty for members of the water board and the surface rights tribunal …

(4) The NPC and the NIRB are to be created by subsequent legislation.

DESCRIPTION AND ANALYSIS

Bill C-33 is the third bill to address the establishment of the Board. Bill C-51, an Act respecting the water resources of Nunavut, was introduced during the 35th Parliament in June 1996, and was the subject of hearings before the House of Commons Standing Committee on Aboriginal Affairs and Northern Development in November 1996. That bill did not proceed beyond committee stage. This was largely due to the perceived need for renewed negotiations between officials of the Department of Indian Affairs and Northern Development (the Department) and NTI in order to resolve outstanding differences as to how to ensure implementing legislation reflected the Agreement's terms. Following those negotiations, a second bill to address the establishment of the Board and that would also have established the Tribunal – Bill C-62 – was introduced during the 36th Parliament in December 1998. It, however, did not proceed beyond First Reading. Bill C-33 concerns largely the same subject-matter as did Bill C-62, i.e., the establishment of the Board and the Tribunal.

Bill C-33 consists of a preamble, 203 clauses and two Schedules. The following discussion highlights selected aspects of the bill and does not review every clause.

A. Introductory Provisions

The bill's preamble sets out the context for the proposed Act as:

- the signing of the Nunavut Land Claims Agreement;
- the coming into force of the Agreement on 9 July 1993; and
- the undertaking of the Government of Canada in the Agreement to establish the Board and the Tribunal as institutions of public government, and to set out by statute all their substantive powers, functions, objectives and duties.

Like other statutes giving effect to provisions of modern treaties such as the Agreement, Bill C-33 explicitly reiterates the Agreement's terms giving the Agreement precedence over inconsistencies or conflicts with the bill, which would itself prevail over inconsistencies or conflicts with all other federal legislation except the *Nunavut Land Claims Agreement Act* (clause 3).

As originally drafted, clause 3 of Bill C-33 also contained a "non-derogation" provision, under which "nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*"[5] (clause 3(3)). The Government of Nunavut, NTI and the Board raised a number of objections to this formulation. They argued it would be ineffective, when contrasted with the original non-derogation language used in federal legislation until 1998, based on section 25 of the *Constitution Act, 1982*,[6] and would not provide the Inuit adequate assurances that their rights under the Agreement would not be impaired or infringed. In response, the Standing Senate Committee on Energy, the Environment and Natural Resources amended Bill C-33 by deleting clause 3(3).

B. Part 1: Nunavut Waters

1. Overview

Part I of Bill C-33 creates the Board to license the use of water and the deposit of waste in Nunavut. Part I defines the Board's powers and jurisdiction over the regulation, use and management of water in the Nunavut Settlement Area. These powers and responsibilities are equivalent to those of the Northwest Territories Water Board under the *Northwest Territories Waters Act*, subject to special provisions in the Agreement. Thus, licence approvals relating to water in the Nunavut Settlement Area are to be made in Nunavut rather than the Northwest Territories (NWT).

Part I requires the Board to work with the NPC in the development of land use plans affecting water, and with the NIRB (or, as the Agreement provides, a federal environmental assessment panel) in assessing environmental impacts of proposals for water-related projects in Nunavut.

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(5) This wording has been used in federal non-derogation provisions since 1998, and was adopted first in the *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25, subsection 5(2).

(6) Section 25 reads, in part: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada. ..." Terms reflecting this language are found in federal non-derogation provisions enacted between 1986 and 1996, e.g., subsection 2(3) of the *Firearms Act*, S.C. 1995, c. 39 and section 2.1 of the *Oceans Act*, S.C. 1996, c. 31.

2. Clauses 4 to 13: General Provisions

Clause 4 sets out a series of definitions for terms used in this part of the Act. Clause 8(1) vests the property in and the right to the use of all waters in Nunavut in Her Majesty, subject to any rights granted by or under any other Act of Parliament in respect of waters in Nunavut. Notwithstanding clause 8(1), clause 8(2) states that the "designated Inuit organization" (NTI or an organization designated by it) has the rights that are provided in the Agreement. These rights include the exclusive right to the use of water on, in or flowing through Inuit-owned land and the right to have water flow through that land substantially unaffected in quality, quantity and flow. Under clause 9, the Minister may delegate various functions under the Act to the territorial Minister responsible for water resources. Clause 11 prohibits the unlicensed use of waters in Nunavut, subject to prescribed exceptions such as use for domestic or specified emergency purposes.

3. Division 1 (Clauses 14 to 41): Nunavut Water Board

This portion of the bill pertains to the establishment and organization of the Board. It includes provisions for appointments to and the composition of the Board, as well as the terms of office and remuneration of Board members. Under clause 14(3), one-half of the Board membership shall be appointed on the nomination of the designated Inuit organization.

Clause 25 provides that the Board shall conduct its business and public hearings in both official languages and, on request, in Inuktitut. Clause 26 stipulates that the head office of the Board shall be located at Gjoa Haven. Provisions relating to the status and general powers of the Board at clauses 28 to 31 authorize the Board to acquire and dispose of property, enter into contracts, and sue or be sued in its own name. Clause 31 stipulates that Board members and employees of the Board shall be indemnified by the Board against all damages awarded against them, any settlement paid by them with the approval of the Minister, and all expenses reasonably incurred by them, if the claim arises out of the good faith execution of their duties.

Under clause 32(1), the Board is to submit an annual budget to the Minister for consideration. Clause 32(4) provides that the accounts of the Board are subject to an annual audit by the auditor of the Board and, where requested by the Minister, audit by the Auditor General of Canada. The auditor and, where applicable, the Auditor General, are required to submit audit reports to the Board and the Minister.

Clause 35 describes the objects of the Board as being to provide for the conservation and utilization of waters in Nunavut, except in a national park, so as to provide optimum benefit from those waters for residents of Nunavut and all Canadians. Clauses 36 and 37 require the Board to contribute to the NPC land use planning process in respect of waters, and to cooperate and coordinate its consideration of applications with the NPC and the NIRB, or any federal environmental assessment panel referred to in section 12.4.7 of the Agreement. Under circumstances set out at clauses 38 and 39, the Board's authority to issue, amend or renew licences can be restricted or delayed by the NPC or the NIRB. Clause 41 permits the Board, either on its own or jointly with the NPC, NIRB and the Nunavut Wildlife Management Board, to make recommendations regarding marine areas.

4. Division 2 (Clauses 42 to 81): Licences

These clauses set out the rules, procedures and conditions for the issuance of licences by the Board. For example, clauses 51 and 52 outline circumstances in which the Board might, or must, hold public hearings when dealing with applications for licences, unless regulations exempt a class of applications from the requirement of a public hearing.

Clause 56(1) stipulates that the issuance, amendment, renewal and cancellation of a type A licence, and, if a public hearing is held, a type B licence, are subject to the approval of the Minister.(7) The issue of legislating ministerial involvement in the licensing process has been of significant concern to NTI and the Board. In their view, such involvement is inconsistent with the Agreement, which gives the Board exclusive authority over licensing decisions. DIAND's position is that licence validity is dependent on ministerial approval, as is the case in Yukon and the Northwest Territories. In partial response to NTI's concerns, an amendment to clause 56 adopted by the House of Commons imposes a time line that the Minister must follow when making decisions about the issuance, amendment, renewal or cancellation of type A and B licences. It consists of an initial 45-day period with the possibility of an additional 45-day extension. If the Minister does not make a decision within this time period, then the licence issuance, amendment, renewal or cancellation is deemed to have been approved by the Minister.

Clauses 58 to 60 address the matter of compensation for existing licence holders and other specified persons whose water use or waste deposit would or could be adversely

(7) Regulations will set out criteria for determining classes of licences.

affected by a projected use of waters or deposit of waste. Clause 61 lists factors that the Board is required to consider in determining whether compensation is appropriate.

Clauses 62 to 67 specifically address the issuance of licences affecting water use and waste deposit on "Inuit-owned land"; this is land owned by the Inuit under the Agreement. Clause 62 gives existing water use by Inuit priority over any licensed use or deposit of waste by any person with a mineral right. According to clause 63(1), the Board shall not issue a licence that might substantially affect the quality, quantity or flow of waters flowing through Inuit-owned land, unless the applicant has entered into a compensation agreement with the designated Inuit organization, or the Board has determined appropriate compensation. In addition, under clause 64 the Board is required to collaborate with its NWT counterpart to arrive at a joint determination of compensation for use of water outside Nunavut that may substantially affect the waters flowing through Inuit-owned land. Clause 65 provides that, for greater certainty, these compensation rules will apply in relation to a body of water that marks the boundary between Inuit-owned land and "other land." The Board is required to consider a number of factors in determining compensation; enumerated at clause 67, they include the cumulative effects of the change, the cultural attachment of Inuit to the affected land, interference with Inuit rights under the Agreement, and so forth.

Clauses 70 to 75 establish the Board's powers to include in a licence "any conditions that it considers appropriate." Clause 71 defines the purposes of fixing conditions as being to minimize: any adverse effects of the licensed use of waters or deposit of waste; any interference with the existing use of waters by the Inuit; and any prescribed losses. These clauses also require that the conditions in a licence meet minimum standards in prescribed circumstances, relating, for example, to water quality standards or specified fisheries regulations.

Clause 77 is a lengthy provision concerned with the expropriation of land or interests in land in Nunavut. Under clause 77(1), an applicant for a licence may be permitted to expropriate such land or interests, in accordance with the federal *Expropriation Act*, provided the Minister, on the Board's recommendation, is satisfied that certain conditions, including the public interest criterion, have been met. Clause 77(4) sets out procedures for resolving disagreements over compensation between the designated Inuit organization and the applicant or licensee through negotiation and/or arbitration. Under clause 77(11), federal Crown lands in Nunavut, or lands of which the federal government has the power to dispose, are not subject to

expropriation. The expropriation of Inuit-owned land is, under clause 77(12), subject to the relevant part of the Agreement.

5. Division 3 (Clauses 82 to 94): Regulations, Enforcement, and Offences and Punishment

Clause 82 gives authority to the Governor in Council, on recommendation of the Minister, to make regulations related to numerous matters associated with water management and deposit of waste in Nunavut, including: the authorization of and conditions governing use of water without a licence; and the prescription of criteria to be applied by the Board in determining the type of licence required for a proposed use of waters or deposit of waste. **In submissions to the Parliamentary Committees studying Bill C-33, the Government of Nunavut, NTI and the Board objected to clause 82(1)(*m*)(i), which authorizes regulations setting fees for water use under a licence, including water use on Inuit-owned lands. They viewed this authority as a direct infringement of Inuit property rights under the Agreement, and recommended that the clause be amended to exempt Inuit-owned lands. Neither Committee endorsed this recommendation. In observations attached to its report back to the Senate, the Standing Senate Committee on Energy, the Environment and Natural Resources did "[view] with concern the Governor-in-Council's regulatory authority over the prescribing of fees for the right to use waters on Inuit-owned land."**

Subsections 82(2) and 82(3) state that, for some regulatory powers, the recommendation of the Minister is subject to the concurrence of the Board while for other regulations the recommendation of the Minister shall be made after consulting with the Board. Under clause 83, the Governor in Council may direct the Board not to issue licences regarding specified waters, or may prohibit an otherwise authorized use of waters or deposit of waste, in prescribed circumstances, such as to enable comprehensive evaluation and planning to be carried out with respect to those waters, including planning by the NPC.

Clauses 85 to 89 outline proposed measures for enforcement by the Minister or by inspectors designated by the Minister. Clause 86 authorizes an inspector to enter and inspect any place except a private residence where there are reasonable grounds to believe this is necessary to ensure compliance with Part I, the regulations, or a licence. In addition, under clause 87 an inspector may, in prescribed circumstances, direct any person to take any "reasonable measures," including cessation of an activity, to prevent water use or waste deposit or the failure of a work related to those functions, or to counteract or remedy resulting adverse effects. Any such

direction is to be communicated to the Board and to the Minister who, after reviewing the direction, may alter or revoke it. Clause 89 provides that, in prescribed circumstances, the Minister may take preventive or remedial measures in relation to adverse effects resulting from the closure or abandonment of a work related to water use or waste deposit.

Clauses 90 and 91 define conduct that constitutes a summary conviction offence under the Act, and the related penalties, both financial and penal.

C. Part 2: Nunavut Surface Rights Tribunal

Part II of the bill creates the Tribunal and gives it jurisdiction to resolve a number of matters, including disputes between Inuit and persons wishing to access Inuit-owned land; between persons who occupy Crown lands and persons holding subsurface rights who wish to access Crown lands; and concerning loss to Inuit as a result of damage to wildlife by development activities.

1. Introductory Provisions (Clauses 95 to 97)

Clause 95 contains definitions of various terms used in Part II. Clauses 96 and 97 reflect the fact that Aboriginal groups in Canada other than Inuit may have made claims in relation to Nunavut.(8) Clause 96 requires the Minister to review with any such group the provisions of Part II other than those implementing obligations under the Agreement, with a view to determining whether those provisions are inconsistent with the matters under negotiation and should be amended. Clause 97 stipulates that, subject to the Agreement, no non-Inuit may enter, cross, or remain on Inuit-owned land without the consent of the designated Inuit organization. Further, no entry order from the Tribunal exempts the recipient from any obligation under an Act of Parliament or the Agreement.

2. Division 1 (Clauses 99 to 132): Establishment and Organization of Tribunal

These clauses provide for the establishment of the Tribunal and set out its powers and procedures. Clause 99 simply provides that the Tribunal is to be constituted by way of

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(8) For example, the Denesuline First Nations of northern Saskatchewan and Manitoba claim that their treaty rights include rights to conduct traditional activities over thousands of kilometres north of 60, that is, north of the southern Nunavut boundary, and the Cree of Northern Quebec claim the Belcher Islands as part of their traditional territories.

ministerial appointment. This is unlike the appointment process for the Board where half the members are to be appointed on the nomination of the designated Inuit organization. Clauses 100 to 104 specify the terms of office and remuneration of Tribunal members. At least two Tribunal members must reside in Nunavut. Clause 105 indemnifies Tribunal members in the same manner as Clause 31 indemnifies Board members.

Clause 106 provides that the Tribunal is required to conduct its business and public hearings in both official languages and, on request, in Inuktitut. Clause 107 stipulates that the Tribunal's head office shall be at Iqaluit. Under clause 112, the Tribunal, like the Board, is empowered to acquire and dispose of property, enter into contracts, and sue or be sued in its own name. Pursuant to clause 114, the accounts of the Tribunal are to be audited annually by the Auditor General of Canada, while clause 115 requires the Tribunal to submit an annual report of its activities to the Minister.

Under clause 117, no person may apply to the Tribunal for an order without first attempting to resolve the matter in dispute by negotiation under prescribed rules. Clauses 117(2) and 118 restrict the Tribunal's authority to make orders in certain circumstances, such as where a matter has not been raised by the parties.

Clause 119 requires the Tribunal to:

- deal with applications in an informal and expeditious manner;
- give due weight to Inuit knowledge of wildlife and the environment; and
- in relation to certain applications, take into account the importance of wildlife to Inuit.

The remaining clauses of Division 1 are largely concerned with procedural matters such as the hearing and disposition of applications, record-keeping and rule-making related to procedures, mediation and costs.

3. Division 2 (Clauses 133 to 142): Entry Orders for Inuit-Owned Land

These clauses prescribe the Tribunal's authority to make entry orders and set terms and conditions for: the use or occupation of or access to Inuit-owned lands for the exercise of mineral rights granted by the Crown or under an Act of Parliament; access across Inuit-owned land for commercial purposes; and access to Inuit-owned land, on the application of the federal or territorial government, for the removal of sand, gravel and other construction materials. Clause 139 lists additional terms and conditions the Tribunal might include in an entry order

pertaining to a right of access, including terms and conditions aimed at reducing adverse effects on the use and enjoyment of the land by the occupant or Inuit. Clause 140 sets out factors the Tribunal might or must consider in determining the amount of compensation payable to the designated Inuit organization and/or the occupant of the land, and outlines proposed methods of payment.

4. Division 3 (Clauses 143 to 149): Entry Orders for Non-Inuit Owned Land

This division sets out the Tribunal's authority to issue entry orders and impose terms and conditions with respect to rights of access, for the exercise of specified mineral rights, to non-Inuit owned land (defined as land in Nunavut not Inuit-owned and not owned or occupied by the Crown). Clause 147 describes factors that the Tribunal is required to take into consideration in determining the amount of compensation payable under such an entry order.

5. Division 4 (Clauses 150 to 151): Mineral Rights and Carving Stone

Clause 150 addresses the Tribunal's role in evaluating the removal of certain "specified substances"[(9)] on Inuit-owned land in relation to the exercise of mineral rights. Clause 151 authorizes the Tribunal to resolve conflicts between a designated Inuit organization with a permit or lease for the quarrying of carving stone on Crown lands and a person with mineral rights in relation to those lands.[(10)]

6. Division 5 (Clauses 152 to 158): Wildlife Compensation

Under clause 153 of the bill, a "developer" is absolutely liable, subject to prescribed exceptions, for certain losses or damage associated with wildlife harvesting that are suffered by a claimant (defined as an Inuk or Inuit) as a result of "development activity."[(11)] Clause 153(2)(*c*) sets the ceiling for a developer's liability for the aggregate loss or damage for each incident at the applicable limit of liability prescribed by regulations under subsection 170(e). Clause 153(4) sets out principles applicable to the determination of compensation under

(9) As defined in clause 2 of the bill, these substances include sand, gravel, limestone, marble, clay, carving stone and so forth.

(10) Under Article 19, part 9 of the Agreement, Inuit have certain rights associated with carving stone on Crown land.

(11) A "development activity" means one carried out on land or water in the Nunavut Settlement Area or in Zones I or II under the Agreement, including commercial, industrial or governmental undertakings and marine transportation associated with an undertaking.

the clause, including the general rule that such compensation "shall not be a guaranteed annual income in perpetuity." Clause 154 provides for additional rules of liability that are applicable in prescribed circumstances to the Minister or to the Ship-source Oil Pollution Fund under the *Marine Liability Act*.

Clauses 155 to 157 provide the mandate for the Tribunal to consider and dispose of applications related to claims for compensation for loss or damage under this division.

7. Division 6 (Clauses 159 to 170): General

This section includes general clauses related to Tribunal decisions, the review of Tribunal orders, and the Governor in Council's regulation-making power. Under clause 163, for instance, a Tribunal order is binding upon persons who subsequently acquire any interest in the land subject to the order. Clause 166 provides that certain determinations of the Tribunal are final and binding, subject to prescribed exceptions, including the Tribunal's authority to review its own orders.

D. Part 3 (Clauses 171 to 203): Transitional Provisions, Consequential and Coordinating Amendments, and Coming Into Force

Part 3 contains relatively routine clauses to provide for necessary transitional considerations (clauses 171 to 175) and consequential amendments necessitated by the bill itself (clauses 176 to 202). Clause 171, for example, provides that the Nunavut Water Board, already established under the Agreement, is continued under this Act, and that acts or decisions of the Board taken before the Act comes into effect are valid, provided those acts or decisions would be valid under the Act. Subject to the same condition, approvals by the Minister and actions of inspectors are also deemed to be valid. Clauses 172 to 174 allow for the transition between the NWT Water Board and the Nunavut Water Board, including the application of certain regulations made under the *Northwest Territories Waters Act* (clause 174). Clause 175 provides for the continuation of the Nunavut Surface Rights Tribunal established under the Agreement.

COMMENTARY

Reaction to Bill C-33, like that to previous bills on the same subject matter, has primarily been to Part I of the legislation, and has come in the main from bodies

directly affected by it and by the Agreement: the Government of Nunavut, NTI and the Board. Generally speaking, their shared concerns have related to four issues:

- **On the non-derogation issue addressed earlier in relation to clause 3, all advocated that the bill's non-derogation clause be redrafted to reflect the terms of section 25 of the *Constitution Act, 1982.* In the alternative, deleting the clause was seen as preferable to the provision as originally drafted. The Senate adopted the latter option, which was endorsed by the Standing Senate Committee on Energy, the Environment and Natural Resources.**
- **On the previously mentioned issue of ministerial involvement in the licensing process under clause 56, the Government of Nunavut has taken the position that ministerial influence over licensing decisions is appropriate when the public interest is at issue, but ought not to be unrestricted. NTI and the Board, supported by the Inuit Tapiriiksat Kanatami, have objected to any ministerial authority over licensing. NTI proposed a number of means by which the Minister's power in this area might be constrained, one of which is reflected in the amendment to clause 56. Although it does not disturb the principle of ministerial authority, the amendment does impose a timeline that the Minister must follow when making licensing decisions, failing which the Board's decision stands. It should be noted that, in October 2001, NTI initiated judicial proceedings to challenge the Minister's August 2001 decision not to approve the conditional licence issued by the Board to the City of Iqaluit in January 2001.[(12)]**
- **On the Governor-in-Council's regulatory authority, under clause 82(1)(*m*)(i), over the prescription of fees for the right to use water, the Government of Nunavut, NTI and the Board are, as indicated above, critical of the absence of an exemption from this provision in relation to water on, in or flowing through Inuit-owned land. In NTI's submissions, the exclusive right to the use of this water enjoyed by the designated Inuit organization under the Agreement encompasses the exclusive right to the benefit of water use, including any rents levied for that purpose. On this point, the Standing Senate Committee on Energy, the Environment and Natural Resources expressed**

(12) *Nunavut Tunngavik Incorporated* v. *Attorney General of Canada and Municipality of Iqaluit*, Federal Court of Canada – Trial Division, File No. T-1628-01. One of the principal conditions set out in the licence issued by the Board required that the Municipality's open burning of unsorted waste end by 1 June 2001.

concern, in Observations appended to its report to the Senate, about the Governor-in-Council's regulatory authority in this area.

- **The three organizations also advocated that Bill C-33 be amended by the insertion of an explicit "positive interpretation" provision to affirm Parliament's intent that the legislation be applied to give effect to the Agreement and ensure the rights it sets out are respected. This recommendation was not adopted.**