

**BILL C-5: AN ACT RESPECTING CIVIL LIABILITY
AND COMPENSATION FOR DAMAGE IN CASE
OF A NUCLEAR INCIDENT**

**Robert Dufresne
Law and Government Division**

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LEGISLATIVE HISTORY OF BILL C-5

HOUSE OF COMMONS

Bill Stage	Date
First Reading:	25 October 2007
Second Reading:	30 October 2007
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Third Reading:	

SENATE

Bill Stage	Date
First Reading:	
Second Reading:	
Committee Report:	
Report Stage:	
Third Reading:	

Royal Assent:

Statutes of Canada

This bill did not become law before the 39th Parliament ended on 7 September 2008.

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

Legislative history by Michel Bédard

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BILL C-5: AN ACT RESPECTING CIVIL LIABILITY AND
COMPENSATION FOR DAMAGE IN CASE OF A NUCLEAR INCIDENT*

BACKGROUND

Bill C-5, An Act respecting civil liability and compensation for damage in case of a nuclear incident, was introduced in the House of Commons by the Honourable Gary Lunn, PC, MP, Minister of Natural Resources. It received first reading in the House on 26 October 2007. Bill C-5 is in substance identical to Bill C-63, which was introduced during the 1st Session of the 39th Parliament and died on the *Order Paper* with the prorogation of Parliament.

Bill C-5 establishes a specific civil liability regime with respect to nuclear incidents and repeals the *Nuclear Liability Act*, which previously provided for such a regime. Like that Act, it makes the operators of nuclear installations exclusively liable, but increases significantly (from \$75 million to \$650 million) the extent of their liability and the financial security that they are required to maintain. It also provides for the establishment of a special Tribunal to hear and decide claims.

The establishment of a form of civil liability and of a requirement to pay compensation in respect of damage caused by a nuclear incident is in line with efforts to manage and minimize the risks involved in the use of nuclear material. These efforts include measures for mitigation, preparation, response and reparation. The bill is chiefly concerned with the last of these measures.

The idea of a specific regime governing civil liability and compensation in case of a nuclear incident is based on the observation that private insurers have systematically and consistently refused to provide coverage for damage resulting from nuclear incidents. The establishment of such a regime makes it possible to fill this gap and provide coverage for such risks.

* 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.

DESCRIPTION AND ANALYSIS

The bill establishes a specific civil liability regime applicable in case of a nuclear incident. It sets out terms and conditions respecting the civil liability and the compensation to be paid for any damage caused in such circumstances. It also provides for the establishment of a Tribunal to administer claims arising from a nuclear incident.

A. Definitions and Designation of Minister (clauses 2 and 3)

Clause 2 sets out definitions that establish some of the main parameters of the bill. Three are worth noting: a “nuclear incident” (the concept that gives the bill its title) is defined as “an occurrence or a series of occurrences having the same origin that causes damage for which an operator is liable under this Act”; an “operator” is the holder of a licence issued under the *Nuclear Safety and Control Act* and designated as such under clause 6 of the bill; and the “Tribunal” is a nuclear claims tribunal established under the bill.

The “Minister,” within the meaning of the bill, is the minister designated by order of the Governor in Council.

B. Application (clauses 4 and 5)

The bill is binding on the federal government and on the provinces.

The bill excludes two types of circumstances from its application: first, incidents resulting from an act of war, hostilities, a civil war or an insurrection – but not a terrorist activity as defined in subsection 83.01(1) of the *Criminal Code*; and, second, damage to the nuclear installation, or to any property located at the installation and used in connection with it, if the operator of the installation is responsible for the damage.

C. Designation of Nuclear Installations (clause 6)

Clause 6 deals with the designation of nuclear installations. The Governor in Council designates the installations by regulation on the recommendation of the Minister after consultation with the Canadian Nuclear Safety Commission. The sites that can be designated are those containing facilities authorized to contain nuclear material under a licence issued in

accordance with the *Nuclear Safety and Control Act*. The bill designates the holder of the licence as the operator of the nuclear installation.

The same designation process applies to means of transport equipped with a nuclear reactor.

D. Liability for Nuclear Incidents

1. Liability of Operator (clauses 7 to 12, 18 and 64)

The bill provides that the only legal liability regime to which the operator of a nuclear installation is subject is the regime established in the bill.

The operator's liability covers damage caused within Canada and within Canada's exclusive economic zone (an area of the sea off Canada's shores) by ionizing radiation emitted from a source of radiation within the operator's nuclear installation or emitted from nuclear material being transported to or from the installation. The operator is also liable for similar damage caused by a combination of the radioactive properties and the toxic, explosive or otherwise dangerous properties of such sources.

Similarly, the operator is liable for certain damage associated with preventive measures taken under an emergency scheme, including economic losses, lost wages, and costs arising from the loss of use of property by the persons affected.

Lastly, if an agreement is concluded with a reciprocating country and the regulations to implement the agreement so provide, the operator's liability can extend to damage that occurs in that country or in that country's exclusive economic zone. The liability covers damage resulting from the production, processing, transport, storage, use or disposition of the nuclear material.

The bill sets certain parameters with respect to the liability regime. First, the operator's liability is absolute: that is, it does not require proof of tort or of fault (clause 9). Further, if more than one operator is liable, each is jointly and severally, or solidarily, liable (clause 10). However, the bill provides, in certain cases, for a narrow exception to the principle of operator liability. Specifically, it excludes damage suffered by an individual in cases where the incident that caused the damage was wholly or partly the result of an act or omission committed by the individual with intent to cause injury or damage, or recklessly and with the knowledge that injury or damage would result. The bill preserves the operator's right of recourse against such an individual, but eliminates the right of recourse against any other person in case of a nuclear incident.

2. Compensable Damage (clauses 13 to 20)

Compensable damage in case of a nuclear incident includes bodily injury, damage to property, and psychological trauma resulting from such injury or damage. Economic losses incurred by a person as a result of bodily injury, damage to property or psychological trauma are also compensable, as are the costs incurred through loss of the use of property and any resulting wage loss. However, if the nuclear installation generates electricity, the costs resulting from the failure to provide electricity are not compensable.

The injury and damage described above are also compensable if they result from preventive measures taken under an emergency scheme.

The bill also provides that the reasonable cost of measures taken to repair, reduce or mitigate the environmental damage caused by an incident can be compensated if the measures were ordered by a government agency responsible for environmental protection.

In the case of a nuclear incident and a concomitant non-nuclear incident, the damage is deemed to have been caused by the nuclear incident, unless it can be identified as having been caused only by the non-nuclear incident.

Lastly, if a nuclear incident occurs during a transport operation, damage to the means of transport, or to the structure or site where the nuclear material is stored, is not compensable under the bill.

3. Financial Provisions (clauses 21 to 27 and 62)

The bill limits the financial liability of an operator to \$650 million, but this amount can be increased by regulation and must be reviewed every five years by the Minister. A nuclear claims tribunal cannot award, in respect of a given incident, an amount that exceeds that limit or, if compensation was paid before the Tribunal was established, an amount that exceeds the difference between the compensation paid and the limit of the liability. However, if Parliament appropriates additional funds, the Tribunal can award those additional funds as compensation (clause 62).

Operators are required to maintain, for each of their installations, financial security in an amount equal to the financial liability required under subclause 21(1) of the bill (currently \$650 million). Federal departments, however, are exempt from this requirement. The security is in the form of insurance with an approved insurer, but an operator can, by concluding a special agreement with the Minister, obtain a portion of the security in an alternative form. The agreement can be revoked by the Minister.

The risk insured by an approved insurer can be reinsured by the federal government through an agreement with the Minister. A copy of the reinsurance agreement must be tabled in each house of Parliament within the first 30 sitting days of that house after the agreement is concluded. A special account of the federal government – the Nuclear Liability Reinsurance Account – is continued under the agreement. Any deficit in the Account will be paid from the Consolidated Revenue Fund.

4. Preservation of Certain Rights and Obligations (clause 28)

The bill does not have the effect of limiting or restricting any rights or obligations arising from a contract of insurance, from a scheme or system of health insurance, employee compensation or occupational disease compensation, or from a survivor or disability provision of a pension plan.

5. Judicial Proceedings (clauses 29 and 30)

The bill provides that an action involving damage is to be brought before the court that has jurisdiction in the place where the nuclear incident occurs, but that the Federal Court of Canada has jurisdiction in respect of any action arising from a nuclear incident that occurs in more than one province or outside any province. However, the bill provides that a specific administrative tribunal can be established to deal with a nuclear incident and the claims resulting from it, and in that case the courts lose their jurisdiction.

Any claims for damage suffered must be brought within three years after the day on which the claimant had knowledge of the damage or – in the case of a death – of the death. Absolutely no action or claim can be brought after 10 years from the day of the incident or, in the case of bodily injury, after 30 years from that day.

E. Nuclear Claims Tribunal (clauses 31 to 63)

1. Establishment and Operation of Tribunal (clauses 31 to 33 and 36 to 37)

The Governor in Council can have the claims arising from a nuclear incident dealt with by a Tribunal “if the Governor in Council believes that it is in the public interest to do so, having regard to the extent and the estimated cost of the damage, and the advantages of having the claims dealt with by an administrative Tribunal” (subclause 31(1)). This is done by means of a declaration, and the Minister must then submit a report to Parliament estimating the cost of the

damage arising from the nuclear incident. As mentioned above, the Tribunal then has exclusive jurisdiction and any other proceedings are discontinued.

As soon as possible after a declaration is made, the Governor in Council establishes the Tribunal and designates the location of its head office in Canada. The purpose of the Tribunal is “to examine and adjudicate claims for damage arising from the nuclear incident as expeditiously as the circumstances and considerations of fairness permit” (subclause 36(2)). The Tribunal must then notify the public of the manner in which to bring a claim, and publish the notice without delay in the *Canada Gazette*.

2. Interim Financial Assistance and Compensation (clauses 34 to 35 and 53 to 54)

After the Governor in Council makes the declaration and before the notice to the public is published, the Minister can provide interim financial assistance to persons who, in the Minister’s opinion, have suffered damage as a result of the nuclear incident. This assistance cannot exceed 20% of the maximum financial liability provided for in subclause 34(2) of the bill. The Minister’s functions in relation to the interim financial assistance can be delegated to any person, association of insurers or province, if the Minister enters into an agreement to that effect.

The Tribunal can also award interim compensation, and must in that case notify the Minister and the claimant. If the Tribunal decides not to award interim compensation, it notifies the claimant only.

3. Membership and Operation of Tribunal (clauses 38 to 43)

The Tribunal is composed of a minimum of five members, including a chairperson, appointed by the Governor in Council to hold office during good behaviour for an appropriate term and who can be removed for cause. The bill grants the members immunity from civil liability “for anything done or said in good faith in the exercise or purported exercise of a power or in the performance or purported performance of a duty or function of the Tribunal” (clause 40). It also grants the Tribunal the power to hire and manage the staff it considers necessary for the conduct of its activities (clause 41).

4. Powers and Duties of Tribunal (clauses 44 to 49)

The bill sets out the powers and duties of the Tribunal. With respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary for the exercise of its jurisdiction, the

Tribunal has the powers, rights and privileges of a superior court. The Tribunal is not bound by the legal rules of evidence, but cannot receive as evidence anything that would be inadmissible in a court. It can issue commissions to take evidence outside Canada. It can require persons claiming compensation to undergo physical or other examinations, and can refuse to hear any claim that it considers frivolous or vexatious. The Tribunal can make any rules that are necessary for the exercise of its powers and the performance of its duties and functions, and must submit to the Minister any report of its activities that the Minister requests.

5. Claims (clauses 50 to 52)

The Tribunal can establish internal panels to hear claims, and establish classes of claims to be determined by a claims officer without a hearing. If necessary, the Minister assigns the claims to the panels and claims officers. Hearings are to be held in public, but can be held wholly or partly in private to protect a person's privacy.

6. Re-hearing and Appeal (clauses 55 to 57)

The bill also establishes a process for the re-hearing and appeal of the Tribunal's decisions. A claimant or an operator can request a re-hearing within 30 days after receiving notification of a decision. The claimant or operator can also appeal a decision if the claim has been heard by a panel consisting of less than three members. An application to appeal must be made in writing to the chairperson of the Tribunal, who has the appeal heard by a panel consisting of three other members.

The decisions of the Tribunal are otherwise final and conclusive. They can be reviewed in a court only on the grounds referred to in subsection 18.1(4) of the *Federal Courts Act*, that is, if the Tribunal failed to observe a principle of natural justice or procedural fairness or any other required procedure, or the decision was founded on fraud or perjured evidence.

7. Financial Provisions (clauses 58 to 63)

Under clauses 58 to 63 of the bill, the payment of claims involves two transfers of funds. On the one hand, once the period for making an appeal or applying for a re-hearing has ended, the Minister pays to the claimants, out of the Nuclear Liability Reinsurance Account (or out of the Consolidated Revenue Fund in case of insufficient funds), the amounts owed to them as a result of the Tribunal's decision. On the other hand, the operator liable for the damage pays the Government of Canada the lesser of the following amounts:

- the amount of the maximum financial liability provided for in the bill (currently \$650 million) less the total amount paid by the operator before the establishment of the Tribunal as compensation for damage arising from the incident; or
- the total of all amounts paid by the Minister under the bill as compensation for damage.

If the operator fails to pay any amount due, the Government of Canada is paid by the approved insurer or by the issuer of the financial instrument serving as alternative financial security.

The Governor in Council can use the regulation-making power to establish classes of damage and set terms and conditions concerning the payment of compensation (awarding the maximum amount or a percentage of that amount). Clause 63 sets out a procedure for dealing with changes to the payment structure for certain classes of damage. If the changes are to the claimant's advantage, the claimant will receive the additional amount payable under the new structure.

F. Reciprocating Agreements (clause 64)

The bill provides that the Governor in Council can declare a country to be a reciprocating country for the purposes of the Act if the Governor in Council is of the opinion that satisfactory arrangements exist for "compensation in that country and in Canada for damage resulting from the production, processing, transport, storage, use or disposition of nuclear material." The Governor in Council has the regulation-making powers to implement any agreement between Canada and such a country in relation to such damage. If an agreement exists between Canada and a reciprocating country, no Canadian court has jurisdiction to determine a claim in respect of such damage unless the regulations to implement the agreement provide otherwise.

G. Offence and Punishment (clause 65)

An operator who does not hold the financial securities required by the bill commits an offence punishable on summary conviction. The punishment is a fine not exceeding \$300,000 for each day on which the offence is committed or continued. However, the operator cannot be found guilty of such an offence if it is established that the operator "exercised due diligence to prevent the commission of the offence" (subclause 65(2)).

H. Regulations (clauses 66 to 68)

Clauses 66 to 68 of the bill set out a series of measures in respect of which the Governor in Council can make regulations under the Act. Clause 66 sets out, among others, regulation-making powers relating to insurance and reinsurance and to the establishment of classes of nuclear establishments. Clause 67 deals with regulations respecting the Tribunal and its members. Clause 68 provides that the Governor in Council can make regulations to establish priorities for certain classes of damage, to fix maximum awards or reduce them on a pro rata basis for certain classes of damage, to establish classes of damage for which compensation is not to be paid, and to extend the time limit for certain classes of damage.

I. Consequential Amendments and Repeal (clauses 69 to 73)

The bill affects three Acts. First, it repeals the *Nuclear Liability Act*. Second, it amends certain provisions of the *Nuclear Safety and Control Act* and the *Transportation of Dangerous Goods Act, 1992* to replace, in those provisions, the title of the repealed Act with the title of the future *Nuclear Liability and Compensation Act* (Bill C-5). The provisions amended state that nothing in the referenced sections restricts the liability of an operator under the *Nuclear Liability and Compensation Act*, the rights and obligations arising from that Act, or the jurisdiction of a Tribunal established under that Act.

J. Coming into Force (clause 74)

The bill, once passed, will come into force on a day fixed by order of the Governor in Council.

COMMENTARY

Bill C-5 has not attracted much media attention or been the subject of any real public debate outside Parliament.