

PRESENTATION TO
THE LEGISLATIVE COMMITTEE ON
BILL C-75

Submitted by:

Makivik Corporation
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TABLE OF CONTENTS

	<u>PAGE</u>
FOREWORD	1
1. GENERAL COMMENTS	2
1.1 Lack of consultation with the Inuit.....	2
Recommendations	4
1.2 Interference with Inuit aboriginal rights	4
Recommendations	5
1.3 Protection of Arctic waters south of 60°	6
Recommendations	7
2. SPECIFIC COMMENTS	8
2.1 Extent of regulatory discretion	8
Recommendations	8 9 10
2.2 Generality of requirements	11
Recommendations	14
2.3 Failings in the prevention of pollution	14
Recommendations	16 19
2.4 Clause 4	20
Recommendations	20
CONCLUSION	20

FOREWORD

Makivik Corporation is an Inuit organization created under Québec law and represents the Inuit of Northern Québec on economic, social and other issues related to implementation of the James Bay and Northern Québec Agreement, as well as Inuit rights and interests in Northern Québec and the offshore.

Although it was impossible for the Executive of Makivik Corporation to present its comments on Bill C-75 to your Committee in person, the needs and interests of the Inuit of Northern Québec must be raised. Of all Canadians, the Inuit are, by far, the most directly affected by any legislation governing the Arctic.

We present this Brief as members of the group of Canadians with most at stake in the Arctic: it is our life, our homeland and our history. It is in this context that we submit our comments and that, we hope, you will consider them.

This Brief contains our general comments on Canadian policy underlying Bill C-75 and our specific comments on what we view to be the most problematic provisions of the Bill.

1. GENERAL COMMENTS

The fundamental flaw in the policy behind Bill C-75 is two-fold: it fails to respect Inuit aboriginal title in the area and adequately protect the Arctic environment. Both aspects call for Inuit involvement in the formulation and implementation of legislation governing the Arctic: our title to the territory entails specific rights to its resources and to its management, and our historical use of the territory provides us with a still unequalled knowledge of its characteristics. In light of these considerations, the fact that the Inuit have not been consulted in the drafting of Bill C-75 and are not involved in its implementation seems inexplicable.

1.1 Lack of consultation with the Inuit

The Inuit of Northern Québec have an unsettled claim to the offshore areas contiguous to their land. We have occupied and used the offshore of Northern Québec since earliest memory and we rely on marine mammals for food, clothing and income. The wildlife resources we harvest are migratory, moving across the land, the ice and the water and moving across geographical and political boundaries. Thus,

any regulation in the Arctic affects us directly and must respect our rights and interests in and to the territory. Such respect is unlikely to be ensured without proper consultation about our needs. Indeed, equity and sound management dictate that our needs and interests receive the utmost consideration.

Our right to be consulted and the necessity that we be consulted, must apply at the early stages in the drafting of the legislation and in its implementation through formal mechanisms: it is the only way to ensure that conceptual or structural problems in the legislation in respect to our needs, be avoided. Yet, this is the first opportunity we have had to comment on Bill C-75, and nowhere in the amendments it proposes is there any provision for consultation of the Inuit in implementation of the legislation. Such consultation would not only be consistent with the nature of our rights but would also reflect the reality of our profound and unique knowledge of the area covered by the legislation.

To remedy the disregard of our aboriginal rights, to put our knowledge to the profit of the whole country and to protect our vital interests, we recommend that Bill C-75 be amended to include provisions on:

- 1- the establishment of a joint Inuit-government environmental advisory committee with the role of:
 - i) recommending needed regulation;
 - ii) determining the adequacy of the legislation and regulations in the light of technological changes and environmental impacts;
 - iii) monitoring implementation of the legislation and regulations, particularly by conveying information between users and the government and by responding to specific problems;
- 2- formal consultation with the Inuit of Northern Québec by allowing at least 90 days before the publication of all regulation and affording Québec Inuit the opportunity to present their comments on such regulations to the Minister;
- 3- empowering the joint environmental advisory committee to appoint an Inuk to assist in the operations of any ship which may, in the opinion of the committee, have a significant negative impact on the environment.

1.2 Interference with Inuit aboriginal rights

Legislation in the Arctic must not prejudice Inuit aboriginal claims to the area including our right to hunt and fish.

Any activity in the Arctic which may interfere with the exercise of our right to harvest its resources constitutes interference with our aboriginal rights. Perhaps we should stress at this point that, by Section 35 of the Constitution Act of 1982, our aboriginal rights have received constitutional protection raising them above the power of the legislature. In other words, our aboriginal rights may

not be unilaterally amended, restricted or extinguished. Yet, the exercise of these rights may be infringed by the consequences of navigation in the Arctic, for example: i) depletion of wildlife; ii) modification of migration patterns; iii) disruption of wildlife reproductive cycles; iv) pollution by oil, toxic waste, noise and nuclear waste. (1)

Therefore, in order to respect our aboriginal rights, we recommend, beyond the formal consultation process recommended above, that Bill C-75 be amended to provide for:

- 1- periodic environmental and social impact assessments of all activities in the Arctic;
- 2- continuous monitoring of environmental impacts;
- 3- protection of the exercise of Inuit harvesting rights in the Arctic by ensuring conservation of its resources and by regulating activities in the area so as to protect Inuit hunting and fishing activities.

1.3 Protection of Arctic waters south of 60°

A comprehensive approach to the matter of protection of the Arctic necessitates extension of the protection of the Arctic Waters Pollution Prevention Act (A.W.P.P.A.)

(1) For further information on the subject, see A. W. Mansfield The Effects of Vessel Traffic in the Arctic on Marine Mammals and Recommendations for Future Research Canadian Technical Report of Fisheries and Aquatic Sciences, No. 1186 (1983).

throughout the Arctic, south of the 60° Parallel. Indeed, below the 60th parallel, the same ecological conditions prevail, the same dangers to and fragility of the environment require stringent regulation of navigation and exploitation, and Inuit title subsists. Thus, there is no justification for limiting protection of the Arctic environment to areas north of the 60th parallel, as stipulated in Section 3 of A.W.P.P.A. It is our contention that such limitation not only finds no basis in the reality of the environment but also fails to protect a fragile and rich territory.

From all the ecological data available, it is clear that the A.W.P.P.A. must be extended to include the area used by the Inuit of Northern Québec. The limit of the 60° parallel appears to be strictly a symbolic one and should be replaced by a more realistic and adequate boundary of the scope of the environmental protection ensured by A.W.P.P.A. and by the Canada Shipping Act. This arbitrary geographic limit of 60° has already been questioned regarding air regulation and a more adequate northern delimitation was proposed as "north of the 50th parallel from the Atlantic to the Ontario/Manitoba border, north of a diagonal line from

that point to the intersection of the 55th parallel and the Manitoba/Saskatchewan border, and north of the 55th parallel to the Pacific." (2)

With the same purpose of adapting the provisions of A.W.P.P.A. and the Canada Shipping Act and considering the ecological characteristics of the Arctic waters in the James Bay, the Hudson Bay, the Ungava Bay and up to the 60° parallel, as well as considering Inuit title and use of the area,

we recommend that Bill C-75 amend the Arctic Waters Pollution Prevention Act to stipulate as follows (amendments underlined) (3):

"3(1) Except where otherwise provided, this Act applies to the waters (in this Act referred to as the "arctic waters") adjacent to the mainland and islands of the Canadian arctic within the area enclosed by the fiftieth parallel of north latitude, from the Atlantic to the Ontario/Manitoba border, north of a line from that point to the intersection of the sixtieth parallel and the west coast of the Hudson Bay, to the one hundred and forty-first meridian of longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles; except that in the area between the island of the Canadian arctic and Greenland, where the line of equidistance between the islands of the Canadian arctic and Greenland is less than one hundred

(2) Hon. Lloyd Axworthy New Canadian Air Policy, Paper presented May 10, 1984.

(3) See map.

nautical miles from the nearest Canadian land, there shall be substituted for the line measured seaward one hundred nautical miles from the nearest Canadian land such line of equidistance.

(2) For greater certainty, the expression "arctic waters" in this Act includes all waters described in subsection (1) and, as this Act applies to or in respect of any person described in paragraph 6(1)(a), all waters adjacent thereto lying north of the fiftieth parallel of north latitude to the west coast of the Hudson Bay and sixtieth parallel to the Pacific Ocean, the natural resources of whose subjacent submarine areas Her Majesty in right of Canada has the right to dispose of or exploit, whether the waters so described or such adjacent waters are in a frozen or a liquid state, including bays but not including inland waters."

2. SPECIFIC COMMENTS

Our specific concerns regarding Bill C-75 bear mainly on four points: the extent of regulatory discretion; the generality of its requirements; the failings in the prevention of pollution; and the effect of Clause 4. We shall examine the specific provisions of Bill C-75 as they relate to each issue.

2.1 Extent of regulatory discretion

Precedents as recent as the passage of the Polar Sea have made us question regulatory discretion: in so many instances of defiance of regulations, the government has simply amended or bypassed, rather than enforced, the regulations. As a result, there is a serious need for

provision of strict criteria for the prevention of pollution in the Act, rather than an open power to regulate at the government's discretion.

The first provision to raise our concern in this regard is Clause 44, paragraph 7 of the Bill, whereby the Governor in Council is empowered to determine the notion of "hazardous cargoes" for the purpose of section 400 paragraph (1.1) of the Canada Shipping Act. It seems to us that, although the determination of "hazardous cargoes" should be flexible enough to adapt to technological changes, it is far too important to be left to regulatory discretion. Rather,

We recommend that the Canada Shipping Act be amended to include a list of hazardous cargoes and that clause 44 (7) of Bill C-75 be amended to stipulate that Section 400 of the Canada Shipping Act be amended as follows:

"(1.1) The Governor in Council may make regulations to make additions to the list of hazardous cargoes herein for the purpose of paragraphs (1) (t), (u) and (v)."

We have the same comments concerning Clause 52(1) of Bill C-75, whereby the Governor in Council may regulate to prohibit the carriage of dangerous goods.

We recommend, rather, that:

- the Act provide the basic list of dangerous goods, and
- stipulate strict conditions or prohibition of their carriage.

Clause 70 of the Bill poses both the problem of regulatory discretion and the problem of the generality of the terms of Bill C-75. We shall examine the second aspect in point 2.2.

Clause 70 grants the Governor in Council regulatory discretion over a very long list of safety measures stipulated in Section 635.1 of the Canada Shipping Act. Our concerns are based on the fact that Section 635.1 lists measures that should be made absolutely compulsory rather than be merely left to the Government's discretion and on the fact that it does not in any way ensure Inuit participation in the establishment and implementation of safety measures.

Therefore, we recommend that:

- the Canada Shipping Act provide for strict safety measures for the items stipulated in s. 635.1;
- such safety measures include: consultation with the Inuit about routes, methods and manoeuvres; and assistance of an Inuk in accordance with our recommendation in point 1.1.

Further, Clause 70 provides for the ^{insertion} ~~amendment~~ of Section 635.1⁽³⁾ to allow the Governor in Council to designate those ships to which safety regulations apply. Leaving determination of the ships subject to safety measures to regulatory discretion constitutes a dangerous loophole: as

we have seen in the past, political expediency could prompt convenient exemptions to the rules with negative environmental consequences.

Our concerns about the scope of regulatory discretion extend to the ~~amendments proposed to~~ ^{insertion of} Section 635.16, and most acutely to Sections 729 and 730 of the Canada Shipping Act. Again, we believe that it is both illogical and imprudent to leave the prohibition of the discharge of pollutants to regulatory discretion. Rather,

we recommend that the discharge be prohibited by the Act except in certain cases where Subsection 729(1) of the Canada Shipping Act would stipulate as follows:

"729. (1) The Governor in Council may make regulations allowing, under certain conditions, the discharge from ships, except as thereby prohibited for the purposes of this Part, of any one or more pollutants specified in the regulations."

As a fundamental guideline, we recommend that regulatory discretion be restricted allowing for the amendments so as to limit the possible influence of political factors in the Arctic and to respond to the fragile balance of the Arctic environment.

2.2 Generality of requirements

Bill C-75 gives a definition in the Canada Shipping Act of "ship" and that is so general that the requirements of

the Act apply without distinctions that would be appropriate. Provisions on the prevention of pollution (Clause 70) should apply to all types of vessels, but other provisions should not apply indiscriminately.

The broad definition given of "ship" in Clause 1 of Bill C-75, amending Section 2 of the Canada Shipping Act, subjects all ships and, hence, small Inuit ships, to regulatory discretion in the matter of payment of charges relating to navigational services (Clause 4) and determination of registration requirements (Clause 6).

Further, Subsection 109(1) of the Canada Shipping Act, makes any requirements regarding the certification of masters and seamen applicable to "any description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation without regard to method or lack of propulsion". The application to Inuit ships of the following areas of regulation would be prejudicial as they would bring an unnecessary burden upon Inuit's small boats:

- pesticides on ships (Clause 44, Subsection 400(1)(w));
- obligation to have on board appropriate charts and nautical publications (Clause 70, Subsection 635.1(1)(a));
- number and qualifications of navigation and engine-room personnel on duty (Clause 70, Subsection 635.1(1)(b));

- procedures and practices to be followed on board (Clause 70, Subsection 635.1(1)(c))
- compulsory and recommended routes (Clause 70, Subsection 635.1(1)(d) and 635.13);
- limitation or prohibition of navigation, operation and anchoring for certain reasons (Clause 70, 635.1(1)(e));
- clearance upon entry in a safety control zone prescribed under the Arctic Waters Pollution Prevention Act (Clause 70, Subsection 635.15), and procedures within the zone (Subsections 635.16 and 635.18).

The provisions above-mentioned allow regulatory discretion as to the applicability of the requirements and in some instances this discretion is specifically protected: Clause 53 substitutes the actual Section 480 to stipulate that "for greater certainty, the meaning of "ship" in subsection (1) is, for the purposes of a contravention of a regulation made under Section 400, co-extensive with the scope of applicability of that regulation", and Clause 70 adds Section 635.1(3)(b) expressly reserving the power of the Governor in Council to "designate to which ships or class of ships the regulation applies".

We believe that a precise definition of the word "ship" could be closer to the reality of the needs for regulation, would fix useful permanent parameters for navigation requirements and would protect the Inuit from omissions in regulations: For example, ships under 30 feet in length do not need, for safety, to carry charts and ships under 45

feet in length do not need to have specifically qualified personnel. To ensure an adequate implementation of the provisions and regulations of the Canada Shipping Act, both respecting the needs of Inuit seamen and providing for all necessary safety measures,

we recommend that the definition of "ship" in subsection 2(a) of the Canada Shipping Act be amended to:

"'ship' except in Parts II, XX and XXI includes:

- a) every description of vessel used in navigation not propelled by oars and measuring over 45 feet in length;

and that subsection 109(1) be amended to stipulate:

109(1) In this Part, 'ship' includes any description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation without regard to method or lack of propulsion and measuring over 45 feet in length, except in subsection 635.1(1)(a) applying to ships, as above-described, measuring over 30 feet in length."

2.3 Failings in the prevention of pollution

In general, we are concerned that the amendments proposed in Bill C-75 to the Canada Shipping Act fall short of the provisions of the Arctic Waters Pollution Prevention Act. The scope of Bill C-75 is limited to safety measures and oil pollution to the expense of the overall protection of the environment. Yet, such consideration should flow automatically from the extension to the Arctic of the application of the Canada Shipping Act.

The weakness of Bill C-75 resides in the fact that it does not adopt A.W.P.P.A.'s strong stand for the prevention of pollution and that it does not consider the dependence of the Inuit upon the Arctic renewable resources. The lack of consideration in Bill C-75 for the prevention of pollution and the protection of Inuit interests results in a piece of legislation which leaves too many areas and issues unregulated.

Specifically, the provisions of Bill C-75 on the prevention of pollution are undermined by the narrow focus on oil pollution and by a lack of control mechanisms and remedies. We understand that the purpose of these amendments are to enforce the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, but we believe it would be ill-advised to disregard at this point all the other very real threats of pollution.

There is no doubt that oil pollution is extremely harmful, but environmental concerns do not stop there; the impact on wildlife and the environment of pollution by waste and noise is also great. In fact, assessments of the effects of navigation in the Arctic reveal that there is more to negative impact than what is strictly defined as "pollution". For example, the navigation impinges upon

marine mammals and interferes with their sound production and hearing (see Mansfield, op. cit. note 1). The detrimental effects consist mainly in the disruption of animal behaviour by destruction of habitat and interference with migration patterns. Regulation of traffic in Arctic waters must take this impact into account. However, Bill C-75 does not and contains the following shortcomings in the prevention of pollution: i) there is no provision for pollution by noise; ii) section 750 on civil liability for pollution does not provide remedy for other than oil pollution; and iii) section 785 limits claims for loss of income to cases due to oil pollution.

We recommend that Bill C-75 be modified to regulate noise pollution and to amend the Canada Shipping Act as follows:

1- subsection 750(1) should read:

"750. (1) Subject to this Part, the owner of a ship is liable

(a) for pollution damage from the ship;

(b) for costs and expenses incurred by
(i) a public authority in Canada, or

(ii) a public authority in a state other than Canada that is a party to the Civil Liability Convention

in respect of measures to prevent, repair, remedy or minimize pollution damage from the ship, including measures taken in anticipation of a discharge of pollutants from the ship, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by such measures; and

(c) for costs and expenses incurred by the Minister in respect of measures taken pursuant to subsection 751(1), to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by such measures."

The rest of the section should refer to "pollution" in general.

- 2- Section 785 be amended to correct both its exclusive application to oil pollution and to allow Inuit hunters and fishermen to claim for actual and future loss of income:

"785 (1) Subject to this section, where

- (a) an individual who derives income
 - (i) from fishing,
 - (ii) from hunting,
 - (iii) from the production, breeding, handling or rearing of fish, or
 - (iv) from the culture or harvesting of marine plants,
- (b) the owner of a fishing vessel who derives income from the rental of fishing vessels to holders of commercial fishing licences issued in Canada,
- (c) an individual who derives income from the handling of fish on shore in Canada directly after the landing thereof from fishing vessels,
- (d) a person who hunts birds, gathers birds eggs or gathers elder down for his own personal or family use,
- (e) a person who hunts or traps animals for personal or family use, or for commercial purposes,
- (f) a person who fishes for purposes of personal, family or community consumption or use,
- (g) a person who rents or charters boats in Canada for sport fishing, or
- (h) a worker in a fish plant in Canada, excluding, except in the case of a family-type-co-operative operation having a total annual throughput of under 1,400 tonnes or an annual average number of employees of under

50, a person engaged exclusively in supervisory or managerial functions, has suffered a loss or will suffer a future loss of income (or of a source of food or animal skins, in the case of a person described in paragraph (d) resulting from a discharge of pollutants from a ship and not recoverable otherwise under this Part of any other law, he may, subject to subsection (4), within three years after the time when the discharge of pollutants occurred or first occurred, as the case may be, or could reasonably be expected to have become known to him, and within six years after the occurrence that caused the discharge, file a claim with the Administrator for such loss or future loss."

- 3- The Canada Shipping Act should be amended to prohibit all discharge of pollutants, except as provided in our proposed section 729(1) of the Canada Shipping Act.

In order to establish strict control mechanisms to prevent pollution in the Arctic, we recommend that in addition to our recommendations in point 1.1:

- 1- Provisions be made regarding the procedures and practices to be followed by persons on board, and other persons, in the event of a discharge of a pollutant;
- 2- Provisions be included for preventing pollution of land, in addition to the air, by ships;
- 3- A Shipping Safety Control Zone should be established with strict criteria for ship construction and equipment and navigational and pilotage standards for such zones. To implement such criteria, pollution prevention officers should be given powers similar to those in subsection 15(3) of the Arctic Waters Pollution Prevention Act;
- 4- The powers to be exercised by a pollution prevention officer pursuant to paragraph (f) of subsection 735(1) should include the power to give directions to ships to prevent harm or disturbance to ecologically sensitive or unique waters regardless of environmental factors, such as weather,

visibility and ice conditions, and of the possibility of the discharge of a pollutant; provision should also be made for the assistance of an Inuk who lives and hunts in the area to act as an observer on board and as a pilot to direct the vessel through these areas.

Access by victims of pollution in the Arctic to legal remedies is another failing of Bill C-75: considering the costs of a suit which requires complex scientific evidence, the human and financial resources of the "pollutors" and the gravity of pollution damage in the Arctic, Bill C-75 must provide for direct access to a simple and economical claims process.

To this purpose, we recommend that:

Subsection 783(1) be clarified by providing that a person may file a claim directly with the Administrator notwithstanding the fact that he has not exhausted all legal actions available to him.

Finally, a legal regime for the prevention of pollution in the Arctic may not be efficient without clearly including the ice. Indeed, the actual confusion between water and ice calls for an explicit extension of the provisions of the Canada Shipping Act to include Arctic ice. Therefore,

we recommend that, Clause 76 of Bill C-75 amend Section 727 of the Canada Shipping Act to stipulate, on the model of Section 3(2) of the Arctic Waters Pollution Prevention Act, that

"'water' includes all Arctic waters whether in a frozen or a liquid state."

2.4 Clause 4

By creating supplementary costs relating to navigation, the implementation of Clause 4 would put an onerous burden on the Inuit population: the Inuit fishing industry would suffer in having to disburse further expenses and the price of cargo would increase for Inuit consumers who are very dependent upon shipping for essential goods.

The Inuit population is poor and faces a higher cost of living than the rest of Canada, precisely because of transportation costs. Any raise in such costs would be passed on the Inuit consumers.

The increase of exploitation costs for the fishing industry, that would result in the implementation of Clause 4, would also put an undue burden on the already slow Inuit economic development.

Therefore, we recommend that Clause 4 of Bill C-75 be deleted.

CONCLUSION

To conclude, we would like to stress the very specific rights and interests of the Inuit of Northern Québec in the areas covered by Bill C-75. Our ancestral occupation of the

territory, unique dependence upon its resources and profound knowledge of its characteristics constitute the very special context of our comments.

We hope that they will receive the attention that our knowledge and interests, as well as our contribution to Canadian sovereignty, command.

Proposed Delimitation
of "Arctic Waters"

