



## COUNCIL OF YUKON FIRST NATIONS

Office of the Grand Chief

January 9, 2015

The Honourable Bernard Valcourt, P.C., M.P.  
Minister of Aboriginal Affairs and Northern Development Canada  
10 Wellington Street  
Gatineau, Quebec  
K1A 0H4

Dear Sir:

**Re: Bill S-6, the *Yukon Environmental and Socio-economic Assessment Act* and its Regulations**

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On behalf of the Council of Yukon First Nations (the “CYFN”), I express appreciation for your willingness to meet with the Yukon First Nation Chiefs and I on December 1, 2014, in Ottawa, to discuss our deep concerns about certain amendments proposed by Bill S-6 to the *Yukon Environmental and Socio-economic Assessment Act* (the “YESAA”). Based on the discussions of our meeting, I make the following comments for your consideration.

### 1. Concerns about certain amendments to the YESAA

I confirm the concerns of the Yukon First Nations with respect to the following amendments to the YESAA proposed by Bill S-6 and reiterate our willingness to work with your officials to resolve these concerns.

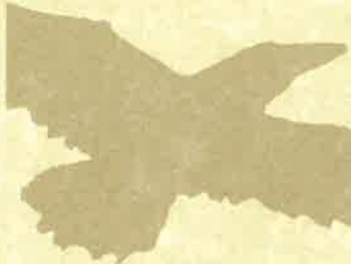
- (a) Policy directions binding on the Yukon Environmental and Socio-economic Assessment Board (the “Board”). Bill S-6 would amend the YESAA to provide authority for the federal Minister to give policy directions that are binding on the Board with respect to the exercise or performance of its powers, duties or functions under the YESAA. Bill S-6 does not direct the federal Minister to consult with or seek the consent of the Yukon First Nations before issuing any policy direction to the Board.

Providing the federal Minister with authority to unilaterally issue policy direction undermines the autonomy of the Board and designated offices and compromises the ability of the Board to carry out its functions without political interference. A single party with authority to direct the Board is contrary to the intentions of the parties when they developed the YESAA.

- (b) Delegation to the territorial Minister. Bill S-6 would amend the YESAA to authorize the federal Minister to delegate, in writing, any or all of his powers, duties or functions under the YESAA to the territorial Minister.

While the federal Minister would be required to notify Yukon First Nations in writing of any such delegation, there is no requirement for the federal Minister to consult





with or obtain the consent of the Yukon First Nations before delegating any responsibilities. There is also no provision for delegation of powers to Yukon First Nation governments. This amendment would establish a bilateral federal-territorial process for the distribution of responsibilities and powers under the YESAA that excludes the Yukon First Nations from that discussion.

Yukon First Nations have heard that the delegation of authority contemplated by Bill S-6 should be of no concern since the Yukon Devolution Transfer Agreement (the “YDTA”) is already in effect. As you know, the YDTA was carefully negotiated and crafted to deal with specific matters and neither addresses environmental or socio-economic review matters nor deal with the operation of the YESAA.


In order to ensure consistency between the Yukon First Nation Final Agreements, the YDTA and the YESAA, Yukon First Nations must be equal partners with Canada and Yukon in decisions concerning the delegation of authority under the YESAA.


- (c) Timelines for Assessments. Bill S-6 would establish timelines for completion of assessments under the YESAA. The Yukon First Nations assert that these timelines are unnecessary since all stages of the YESAA process are already subject to fixed timelines that are established in the YESAA regulations and rules established by the Board.

The proposed timelines for screenings by the Executive Committee and panel reviews would not provide adequate time to complete the assessment of complex projects. This means that assessments of large projects that may impact Yukon First Nations’ rights and interests may not be thorough and complete. It will also likely reduce the time provided in the assessment for Yukon First Nations’ review of proposals and, as a result, reduce the effectiveness of engagement and consultation with the Yukon First Nations.

- (d) Exemptions for Renewal and Amendments. Bill S-6 would amend the YESAA to exempt projects from new assessments where an authorization is renewed or amended unless, in the opinion of a decision body for the project, there is a significant change to the original project.

This proposed amendment conflicts with the recommendation implemented with respect to this issue as part of the five-year YESAA review. As agreed-to in the five-year review, the Board made changes to its policies with respect to the scope of assessments to address concerns about requirements for assessment of all renewals and amendments. The current regime provides for exemptions of renewals and amendments where the effects of those were explicitly considered in earlier assessments. The proposed amendment, on the other hand, creates a much broader exemption that will allow exemption of projects for which the effects have not been considered. The exemption of such projects would be inconsistent with the objectives of Chapter 12 of the First Nation Final Agreements, specifically failing to provide for a comprehensive review of the “environmental and socio-economic effects of any project before the approval of the project.” Exemptions for projects under the YESAA should be based on whether the effects have previously been considered in an assessment, not whether the project is a “significant change” to the original project.





During the development of the YESAA, the parties agreed that the regulations would define which projects and activities are subject to assessment. The proposed amendment interferes with that approach.

## 2. Outstanding issues from the five-year review

Section 12.19.3 of the Final Agreements directed the CYFN and the federal and territorial governments to undertake a comprehensive review of the YESAA within five years of its enactment. This review was commenced in 2008 and Canada asserts that the review has been completed. But the Yukon First Nations have maintained that three key issues arising from the five-year YESAA review remain outstanding.


The parties approved terms of reference for the five-year YESAA review that directed the representatives of the CYFN and federal and territorial governments to make “best efforts” to develop consensus recommendations. The terms of reference establish a three-phase review process: (i) information gathering and issues scoping; (ii) issue analysis; and (iii) response by the parties to the recommendations.

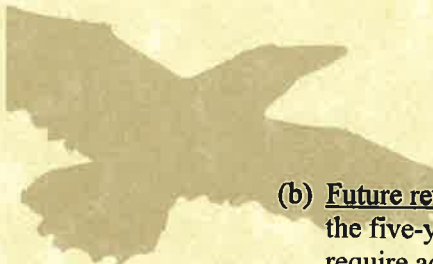
The first phase of the review was completed in May 2009 and was followed by the completion of the second phase in October 2009 with the release of a report by SENES Consultants Limited, an independent consultant. During the third phase the designated representatives of the parties to the UFA reviewed the recommendations made at the conclusion of the second phase and worked to prepare a report that sets out their recommendations that would be submitted to the parties of the UFA for their consideration.

At this time, the Yukon First Nations maintain that the third phase of the review has not yet been completed. While the CYFN and federal and territorial representatives have reached agreement with respect to many recommendations made by SENES and the Board has implemented some recommendations, three key issues identified by the CYFN remain outstanding. In fact, the parties agreed in 2012 to submit an “interim” report to their respective principals so the implementation of the recommendations set out in that interim report could proceed without delay. The CYFN requested that this interim report specifically acknowledge that the three key issues summarized below remain outstanding and require further work. The interim report provides no discussion about these issues because the parties acknowledged that further discussion was required.

- (a) Decision body engagement with affected Yukon First Nations. The Yukon First Nations propose federal or territorial decision body must engage with the affected Yukon First Nation when it is considering recommendations from the Executive Committee or a designated office with respect to a project that may affect its aboriginal or treaty rights, titles or interests. This engagement must take place prior to the issuance of the decision document.

This engagement process would not constitute a veto in any way. The objective of this engagement process would be constructive dialogue and discussion between a Yukon First Nation and the federal or territorial decision-maker. A Yukon First Nation would be able to raise issues and make suggestions to the decision-maker during the engagement process with respect to a YESAA recommendation. This engagement amongst affected governments in the Yukon would be an expeditious process without raising transparency or fairness concerns. Engagement currently takes place on an ad-hoc basis, but clear requirements should be established for certain circumstances and projects.



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- (b) Future review. Although the federal and territorial governments have only committed to the five-year YESAA review, it is reasonable to suggest that the YESAA process will require adjustments and tweaks to deal with future circumstances and ensure effectiveness and efficiency. Some provisions of the YESAA have not yet been operational, such as provisions related to panel reviews and strategic assessments. Therefore, it would be prudent for the parties to commit to undertake another review of the YESAA process in the future.
- (c) Adequate funding for the Yukon First Nations. If the YESAA process is to operate effectively and efficiently, the Yukon First Nations must have the resources to fulfill their duties and be able to participate fully with respect to the assessment and review of activities and projects within their respective traditional territories.

Due to the significant increase in the number, scale and complexity of activities and projects proposed in certain areas of the Yukon Territory, this issue has been raised consistently by Yukon First Nations and others over the past decade.

In addition to refusing to work with us to address the three outstanding issues relating to the YESAA review, the federal officials made final changes to the interim YESAA review report that are misleading and omit or mischaracterize the concerns of the CYFN. This final version of the draft interim report does not accurately reflect the understandings of the parties or the positions of the CYFN. In an earlier letter dated October 26, 2012, and enclosed for ease of reference, I have raised these concerns to you and the Premier.

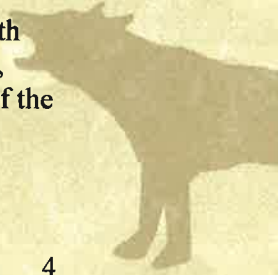
### **3. Regulations**

Your officials have advised the Yukon First Nations that the federal government wishes to undertake a review of the regulations made under the YESAA and, where appropriate, amend them. These regulations are key elements of the YESAA process.

Similar to the development of the YESAA, the *Assessable Activities, Exceptions and Executive Committee Project Regulations* and *Decision Body Time Periods and Consultation Regulations* were developed jointly by the federal and territorial governments and the Yukon First Nations.

The courts in Canada have found that the Crown has a constitutional duty to consult with First Nations with respect to the development of legislation, including regulations, that may have a potential adverse impact on an Aboriginal claim or right of those First Nations. In this case, the Crown has a duty to consult and, where appropriate, accommodate the concerns raised by the Yukon First Nations during the consultations since the YESAA regulations govern the assessment of certain activities proposed relating to the lands, waters and resources within their respective traditional territories.

As your officials have been advised, the capacity of the Yukon First Nations' staff and technicians is limited and they have been focused wholly on the assessment and analysis of Bill S-6 and they expect to continue to be so focused for the foreseeable future. Despite the lack of urgency to commence the review of the YESAA regulations, I have instructed my officials to engage with your officials to determine the consultation process for the review of the YESAA regulations, including the establishment of timelines and provision of funding, and the nature and scope of the review, such as its purposes and objectives.





#### 4. Yukon First Nations are governments

At our meeting, you asserted that the federal Minister would be unable to delegate his or her powers, duties or functions under the YESAA to a Yukon First Nation since the Yukon First Nations are not defined as “governments” in “Chapter 1 – Definitions” of the Yukon First Nation Final Agreements. I do not agree with your interpretation since this definition of “government” does not apply to the interpretation of the YESAA. Moreover, I reiterate that the Yukon First Nations are governments.

In any event, the Yukon First Nations are no longer bands under the *Indian Act*. They have entered into self-government agreements pursuant to “Chapter 24 – Yukon Indian Self-Government” of the Umbrella Final Agreement and the Yukon First Nation Final Agreements that recognize them as governments within the legal framework of Canada.

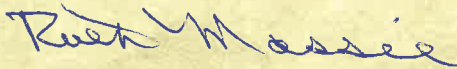
Under the terms of their respective self-government agreements, the Yukon First Nations have broad law-making powers to enact laws relating to their lands and citizens. In fact, a law made by the territorial government would be inoperative to the extent that it provides for any matter for which provision in a law made by a Yukon First Nation. The Yukon First Nations also have the power to make tax laws and, for purposes of the *Income Tax Act*, each is “deemed to be a public government performing a function of government in Canada.”

#### 5. Our proposal

Based on the above, I propose that Bill S-6 be set aside until the proposed review of the YESAA regulations is completed. To that end, we are prepared to instruct our officials to work with their federal and territorial counterparts to develop the consultation process for the review. Ultimately this review may address the concerns of industry and others relating to the YESAA process based on ten years of operational experience.

In closing, I again confirm our willingness to work with you to address our concerns relating to the above-noted matters. We look forward to your response.

Sincerely,



Ruth Massie  
Grand Chief

Enclosure (1)

cc. Yukon First Nation Chiefs  
Right Honourable Stephen Harper, Prime Minister of Canada  
Member of Parliament Ryan Leef, House of Commons of Canada  
Honourable Member of Parliament Thomas Mulcair, New Democratic Party Leader  
Member of Parliament Justin Trudeau, Liberal Party Leader  
Premier Darrell Pasloski, Yukon Government