

## **PRESENTATION TO THE STANDING SENATE COMMITTEE ON ENERGY, THE ENVIRONMENT AND NATURAL RESOURCES**

My name is Ruth Massie. I am the Grand Chief of the Council of Yukon First Nations (the “CYFN”). Daryn Leas is legal counsel for the CYFN and is attending with us this morning.

We are pleased to present this submission to you in person that sets out comments with respect to the amendments proposed by Bill S-6 with respect to the *Yukon Environmental and Socio-economic Assessment Act* (the “YESAA”). We have been advised that other Yukon First Nations have requested opportunities to make a presentation to this Standing Senate Committee about Bill S-6. We support their requests and urge you to hear and consider their views and concerns.

### **1. Who is the CYFN?**

The CYFN is the successor organization to the Council for Yukon Indians that represented the Yukon First Nation citizens in the land claim negotiations in the Yukon and signed the Umbrella Final Agreement (the “UFA”) in 1993. The UFA directed the CYFN, Canada and Yukon to develop legislation to implement the objectives and principles set out in “Chapter 12 – Development Assessment.” This legislation is the YESAA.

The CYFN has a membership of nine self-governing Yukon First Nations and we work in collaboration with the other Yukon First Nations, including the three unsigned First Nations, with respect to specific projects and initiatives.

In particular, the CYFN and Yukon First Nations have worked cooperatively to deal with matters relating to the YESAA over the past fifteen years, including its development, implementation and review.

## **2. Executive Summary**

The UFA directed the CYFN, Canada and Yukon to complete a comprehensive review of the YESAA in 2008. This is known as the “five-year” review since it was directed to take place five years after the federal enactment of the YESAA. Despite the claims of the federal officials, this review has not yet been completed. For several years during the five-year review the federal officials maintained that no legislative changes would be made to the YESAA in order to implement any recommendations of the five-year review. Canada now proposes that Bill S-6 would amend the YESAA pursuant to its *Action Plan to Improve Northern Regulatory Regimes*.

It is our position that certain amendments to the YESAA proposed by Bill S-6 undermine the spirit and purpose of the YESAA that implements treaty rights of Yukon First Nations and their citizens. These proposed amendments fundamentally alter the operation of the YESAA process. In some cases, these proposed amendments relate to matters that were never discussed during the five-year review or, in other cases, contradict agreements reached by the CYFN, Canada and Yukon during that review.

If the amendments proposed by Bill S-6 are proclaimed, the Crown will have breached its duty to consult and accommodate owed to Yukon First Nations and its constitutional duty to uphold the honour of the Crown.

In our view, these amendments would infringe rights under our land claim agreements, including the right for independent assessment of certain projects to be carried out in accordance with Chapter 12 of the Final Agreements. These amendments would also serve to undermine the integrity and effectiveness of the YESAA.

This means that the amendments proposed by Bill S-6 must be rejected or revised.

### **3. Yukon First Nation Final Agreements**

After more than two decades of negotiations with the federal government and the territorial government, the CYFN signed the UFA in 1993. Subsequently eleven Yukon First Nations negotiated and ratified their respective comprehensive land claim and self-government agreements in accordance with the UFA. These land claim agreements are known as Final Agreements and they are land claim agreements within the meaning of section 35 of the *Constitution Act, 1982*.

Under the UFA, each Yukon First Nation was allocated a specific quantum of land that it would retain as settlement land under its Final Agreement. The UFA's land quantum of 16,000 square miles is less than ten percent of the total area of the Yukon Territory. This was a difficult bargain for the self-governing Yukon First Nations to accept. However, they accepted this limited land quantum since the UFA provided that the lands and resources on Crown lands throughout their traditional territories would be managed in accordance with the principles and process established in the Final Agreements.

In particular, the implementation of the development assessment process pursuant to Chapter 12 established an independent assessment process in federal legislation that acted at arm's-length from the Yukon First Nations and the federal and territorial governments to undertake socio-economic and environmental assessments of certain proposed projects located on Crown land and settlement land.

The federal legislation that implements the development assessment provisions of the Chapter 12 is known as the YESAA.

#### **4. YESAA**

The Final Agreements provided for the establishment of the YESAA to address the unique legal and socio-economic circumstances of the Yukon and ensure that development assessment in the Yukon is based on specific values and principles. It was intended to be a “made in the Yukon” approach to development assessment. The YESAA is a cornerstone of our land claim agreements and it is important to ensure that the lands and resources throughout our traditional territories are managed in accordance with our Final Agreements and their objectives cannot be overstated.

The YESAA, and any amendment to it, must be consistent with the Final Agreements and meet the objectives set out in Chapter 12. Among other matters, these objectives provide that the development assessment process will:

- 4.1 recognize and enhance, to the extent practicable, the traditional economy of Yukon Indian People and their special relationship with the wilderness Environment;

- 4.2 provide for guaranteed participation by Yukon Indian People and utilizes the knowledge and experience of Yukon Indian People in the development assessment process;
- 4.3 protect and promote the well-being of Yukon Indian People and of their communities . . . .;
- 4.4 protect and maintain environmental quality and ensures that projects are undertaken consistent with the principle of sustainable development; and
- 4.5 require proponents to consider the environmental and socio-economic effects of projects and project alternatives and to incorporate appropriate mitigative measures in the design of projects.

The CYFN and federal and territorial governments established a technical working group in 1997 to develop the YESAA and its regulations in accordance with Chapter 12. This working group was comprised of each party's chief negotiator, legal counsel and technical advisors. Over a period of several years, the working team discussed policy matters and reviewed various drafts of the YESAA and its regulations with the federal legislative counsel and provided drafting instructions to them. This was a collaborative process that worked effectively.

The YESAA was brought into force in 2003.

## **5. Five-year review of the YESAA**

Pursuant to section 12.19.3 of the UFA, the CYFN, including the Yukon First Nations, Canada and Yukon undertook a comprehensive review of the YESAA.

This review is about ensuring that the treaty provisions relating to development assessment are being implemented effectively and efficiently.

The CYFN, Canada and Yukon established a three-phase process for the five-year review under the terms of reference that they approved in 2008. Under the first two phases, SENES Consulting Limited, an independent contractor, was retained to gather information and scope issues and it set out its observations, conclusions and recommendations in its *Observations and Conclusions Report* (the “SENES Report”) that was submitted to the CYFN, Canada, Yukon, and Yukon Environmental Socio-Economic Assessment Board in October 2009. Under the final phase of the review, the CYFN, Yukon First Nations, Canada and Yukon considered the sixty-three recommendations set out in the SENES Report and undertook to jointly develop a response to the SENES Report’s recommendations.

Representatives of the CYFN, Yukon First Nations, Canada and Yukon worked together over the next few years to categorize the recommendations of the SENES Report and identify any other issues. They identified where there was substantive agreement with respect to certain recommendations and where there was a need for further discussion. Ultimately they agreed in 2012 to submit an interim YESAA review report to their respective principals so the implementation of the recommendations set out in that interim report could proceed without delay. This agreement was based on the understanding that the interim the YESAA review report was not complete and the acknowledgement of the position of the CYFN and Yukon First Nations that three key issues remained outstanding.

Initially, CYFN, Yukon First Nations, Canada and Yukon worked collaboratively to prepare the interim YESAA review report. In the end however, Canada unilaterally finalized the report and systematically rejected CYFN and Yukon First Nations input. Subsequently the CYFN advised the AANDC Minister and Premier that the interim YESAA review report prepared by federal officials was misleading and omitted or mischaracterized the concerns and positions of the CYFN.

The CYFN reiterates that the five-year review has not been completed and three key issues identified by the Yukon First Nations remain outstanding. In our view, the federal and territorial officials have not yet discharged their obligation to make “best efforts” in good faith to reach consensus recommendations, propose alternate approaches or identify options to address our key priorities. These three key issues are as follows.

- 5.1 Future review. Despite the outcomes of the five-year review, it is reasonable to expect that the YESAA process will require adjustments and tweaks to deal with future circumstances and ensure effectiveness and efficiency. In fact, some provisions 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.

- 5.2 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 of projects within their respective traditional territories. Due to the significant increase in the number, scale and complexity of projects proposed in certain areas of the Yukon Territory, this issue has been raised consistently by the CYFN.
- 5.3 Decision body engagement with affected Yukon First Nations. The CYFN has proposed that a territorial or federal decision body must engage with a Yukon First Nation when it is considering recommendations from the Executive Committee or a Designated Office with respect to projects that may affect its aboriginal or treaty rights, titles or interests. This engagement must take place prior to the issuance of the decision document.

A timely engagement process would bring improved resource management decisions and promote collaboration between Yukon First Nations and the federal and territorial governments. It must be noted that the CYFN has proposed a number of options to the federal and territorial representatives to establish this engagement process. Federal and territorial representatives have consistently failed to provide any responses except outright rejection of the concept.



While a number of amendments were proposed to the YESAA to implement various recommendations of the five-year review, including the future review and decision body engagement issues, the federal officials were unwilling to consider any amendments to the YESAA to address these recommendations.

## **6. Federal regulatory improvement initiative**

In late 2007, AANDC announced publicly that it had commissioned Neil McCrank to review and report on the regulatory systems in the three northern territories. In his report dated May 2008 entitled *Road to Improvement – The Review of the Regulatory System Across the North* (the “McCrank Report”), McCrank wrote that the YESAA “provides some stability and predictability in the environmental assessment process” and any issues relating to the YESAA or the regulatory system in the Yukon “can be reviewed as part of the five (5) year review of this new Act, which is just commencing.”

The McCrank Report made only a single recommendation about the Yukon: “All affected parties should make it a priority to participate in the five (5) year review of the *Yukon Environmental and Socio-economic Assessment Act* (YESAA), so as to complete the review in a timely fashion.”

Prior to the completion of the five-year review, the federal government announced its *Action Plan to Improve Northern Regulatory Regimes* on May 3, 2010.

The *Action Plan* proposed generally that the YESAA be amended so that it “would contribute to the efficient and predictable environmental assessment process in Yukon, which will promote investor confidence, foster economic opportunities and growth while promoting sound environmental stewardship.” In response to the *Action Plan*, the CYFN and Yukon First Nations asserted that the five-year review must be completed and any legislative changes should be discussed as part of that review.

Although the *Action Plan* spoke about legislative changes to the YESAA, the CYFN and Yukon First Nations were not provided the text of the proposed amendments to the YESAA referred to in the *Action Plan*, as set out in Bill S-6, until earlier this year.

The federal government initially provided a draft of proposed amendments to the YESAA to the CYFN at a meeting on May 30, 2013. This draft included proposed amendments to implement some recommendations of the five-year review as well as other changes identified as part of its *Action Plan*. Subsequently the CYFN and Yukon First Nations proposed that the federal approach to developing amendments should be more collaborative and recommended the creation of a working group.

They also proposed that the amendments should address all of the changes recommended by the five-year review. In response, the federal government retracted these proposed amendments and the AANDC Minister proposed the creation of a working group to provide departmental officials with information to provide drafting instructions. Unfortunately this working group was not established.

At a meeting on November 26, 2013, the federal government made a presentation about amendment concepts. But no text of the proposed amendments was provided.

The federal government only tabled a draft of proposed amendments a meeting on February 26, 2014. This new draft included proposed amendments relating to certain recommendations of the five-year review and issues raised directly by the Yukon to the federal government. The CYFN finally saw a copy of the draft bill on May 23, 2014, which was introduced subsequently to the Senate on June 3, 2014.

## **7. Bill S-6**

While the CYFN has concerns about the nature and scope of many of the amendments proposed in Bill S-6, we want to draw your attention to four specific amendments that are deeply concerning. The CYFN and Yukon First Nations maintain that these proposed amendments, if approved, would undermine the independence and autonomy of the YESAA and adversely impact its effectiveness.

- 7.1 **Policy direction to the Board.** The CYFN opposes any amendment that provides authority for the AANDC Minister to issue binding policy directions to the Board with respect to any of the Board's powers, duties or functions.

This proposed amendment is unacceptable for a number of reasons. There is no requirement for the AANDC Minister to obtain the consent of First Nations before issuing policy direction to the Board.

Providing the AANDC Minister with authority to unilaterally issue policy direction undermines the independence of the Board and Designated Offices when conducting assessments. Independence is a fundamental element of the YESAA that was discussed at length by the CYFN, Canada and Yukon during the development of the YESAA.

Providing a single party with authority to direct the Board is contrary to the spirit and intent of the YESAA and the provisions of the Final Agreements. Neither the YESAA nor the Final Agreements contemplate that the federal government would have the power to apply its policies to the assessment of projects located on settlement land.

- 7.2 **Delegation of federal powers.** The CYFN opposes any amendment that would allow the AANDC Minister to delegate any or all of his or her powers, duties and functions under the YESAA to the territorial Minister.

The CYFN has several concerns relating to this proposed amendment. There is no requirement for the AANDC Minister to obtain the consent of Yukon First Nations before delegating any powers, duties or functions. The AANDC Minister only has to provide notice to the Yukon First Nations.

Notwithstanding that the YESAA implements treaty rights, this provision would exclude Yukon First Nations from discussions and decisions about future re-distributions of powers, duties and functions under the YESAA. It would create a bilateral federal-territorial process. This approach would not be consistent with the intent of the Final Agreements.

7.3 **Exemptions for renewals and amendments.** The CYFN opposes any amendment that creates a broad exemption from the YESAA for renewals and amendments of permits or authorizations.

This proposed amendment is unacceptable since it would directly contravene the agreements reached by the CYFN, Canada and Yukon about this issue as part of the five-year review. It is unnecessary because previously existing concerns about assessments of renewals and amendments have already been addressed by changes in Board policies as agreed during the five-year review. This proposed amendment will interfere with a process that is working effectively.

During the development of the YESAA, the CYFN, Canada and Yukon agreed that the regulations would define which projects are subject to assessment. The proposed amendment would interfere with this approach. Canada has identified its intent to proceed with amendments of the regulations. Discussions about the regulations are the appropriate forum for addressing exemptions and inclusions of projects from assessment.

7.4 **Timelines of the YESAA assessments.** The CYFN opposes the proposed amendments that establish overall timelines for completion of assessments under the YESAA since timelines are already in place.

The proposed timelines for screenings by the Executive Committee (15 months) and Panel Reviews (18 months) do not provide adequate time to complete assessment of complex projects that will be the subject of these assessments.

This will affect the thoroughness of assessments and the opportunities for Yukon First Nations to complete comprehensive reviews of projects and provide input – a process that the federal government relies on to fulfill its duties for consultation.

The Executive Committee's screening process for the MacTung Project consumed a total of approximately 34 months of assessor/government time for completion. Therefore, it is unrealistic to expect that assessments of similar projects could be completed in 15 months.

While no panel reviews have been completed under the YESAA, timelines of 18 months are not consistent with the durations required (or provided in legislation) to complete panel assessments in other jurisdictions.

These amendments are inconsistent with the objectives of Chapter 12. They are contrary to the spirit and intent of the YESAA that was developed through a comprehensive tripartite process by the CYFN, Canada and Yukon to implement Chapter 12.

With the exception of the proposed amendment relating to the exemption for renewals and amendments that directly contradicts the agreement reached by the CYFN, Canada and Yukon during the five-year review, Canada failed to raise these proposed amendments during the five-year review process, where they would have received detailed discussion and consideration. These matters were never discussed during the five-year review.

## 8. Concerns about Bill S-6

Subject to the matters raised during the five-year review, it is our view that the YESAA has been operating effectively and efficiently since its enactment in 2003. Yet the federal government now wants to unilaterally make amendments to the YESAA. Since we are not requesting these amendments or supporting them, we have to ask what is the need to amend the YESAA? Who is asking for these changes to the YESAA? What are the purposes of these amendments? What is urgency to make these amendments?

If Bill S-6 amends the YESAA, the CYFN makes the following assertions.

- 8.1 The CYFN and Yukon First Nations assert that the amendments to the YESAA proposed by Bill S-6 would breach the Crown's **duty to consult and accommodate** with respect to the proposed changes to the YESAA. While some many assert that there was a "tremendous amount of consultation" over the past year, they do not understand the scope and nature of the Crown's duty to consult with Yukon First Nations where the proposed action by government may infringe or impact treaty rights and, where appropriate, accommodate the concerns raised by the Yukon First Nations during those consultations. It is not enough for federal officials and representatives to say that they met with us from time to time.

Despite the concerns raised by the CYFN and Yukon First Nations during the consultations relating to Bill S-6, the federal officials have not engaged in any discussions in good faith with the CYFN and Yukon First Nations to address our concerns relating to the proposed amendments to the YESAA.

The federal government has not demonstrated any mandate or interest in meaningfully consulting or negotiating with the CYFN and Yukon First Nations to address our substantive interests and concerns. The federal officials were willing to meet with the representatives of the CYFN and Yukon First Nations to provide explanations and clarifications about the nature and scope of the proposed amendments and listen to the concerns raised. Instead they refused to engage in good faith with the CYFN and Yukon First Nations to address those concerns.

- 8.2 The CYFN and Yukon First Nations assert that the federal government would breach its constitutional duty to uphold the **honour of the Crown** when it proceeded unilaterally with amendments to the YESAA relating to new matters that were not discussed or raised during the five-year review or, in the case of the amendment that would create exemptions for project renewals and changes, contradict agreements reached during the five-year review.

In addition, the federal government breached its constitutional duties when it refused to complete the five-year review, and systematically rejected input from First Nations when finalizing the interim review report. Canada and Yukon seem to have simply walked away from the review.



8.3 The CYFN and Yukon First Nations assert that the amendments to the YESAA would **infringe their treaty rights** under Chapter 12, including the right for independent assessments of certain projects in accordance with the objectives of Chapter 12. These proposed amendments would impact the integrity, independence and effectiveness of the YESAA process.

It is our view that the federal government is not acting in good faith and its actions relating to Bill S-6 constitute bad faith.

## 9. Conclusion

We urge the Senate to give consideration to this presentation and reject Bill S-6 or amend it to address our concerns.

Moreover, we are deeply troubled that the *Legislative Summary - Bill S-6: An Act to amend the Yukon Environmental and Socio-economic Assessment Act and the Nunavut Waters and Nunavut Surface Rights Tribunal Act* dated June 18, 2014, states that the five-year review was finalized in October 2012 and that “according to department documentation, Bill S-6 reflects agreed-upon recommendations arising from the review of the Act.” These statements are misleading and inconsistent with the facts.

This morning, we reaffirm our willingness to work with the federal and territorial governments to ensure that the YESAA process continues to be effective and efficient in accordance with the Final Agreements. The parties must commit to work together to develop any changes to the YESAA in a manner similar to the tripartite development of the YESAA.

The CYFN suggests again that the parties commit to complete the five-year review and, as part of that review, consider any amendments to the YESAA.

However, it appears that the approval of these proposed amendments is an urgent priority for the federal government and it is prepared to breach the constitutional duties that it owes Yukon First Nations, infringe the treaty rights of Yukon First Nations and undermine the integrity and effectiveness of the YESAA in order to push these proposed amendments through the system. For what benefit?

While the CYFN does not want to follow the Tlicho and Sahtu who have been forced to commence litigation to challenge the validity of amendments made to the environmental assessment process in the Northwest Territories which, like the Yukon, is rooted in their respective land claim agreements, the CYFN and Yukon First Nations will take steps necessary to protect the integrity of the Final Agreements.

Thank you. Merci. Másj.