**CHANGES TO YESAA THREATEN**

**Our Environment, Our Economy, Our Yukon**

**Myths and Realities**

There are a lot of misunderstandings and incorrect statements being made about the proposed amendments to YESAA, and Yukon First Nations issues with these amendments. This “Myths and Realities” document is aimed at correcting some of the more common myths and twisting of the facts and issues.

Furthermore, several statements made by federal and territorial elected officials have been incorrect, misleading or incomplete in response to the concerns raised by the Yukon First Nations with respect to certain amendments proposed in Bill S-6. We must respond to those statements in order to correct the record and provide a full picture of what occurred during the development of Bill S-6 and our position during this process.

**Myth: There have been thousands of hours of consultation with First Nations on changes to YESAA over the past 7 years.**

**Reality:** The Parties discussed the YESAA process for many hours between 2008 and 2011, as part of the YESAA Five-Year Review. It was a review required under the Umbrella Final Agreement (UFA). The Parties to the UFA, the Council of Yukon First Nations (CYFN), Canada and Yukon agreed to work together to improve the YESAA process through shared decision making and by consensus, when possible.

The amendments to YESAA under Bill S-6 that are of concern were never discussed and were never raised by Canada during the Five-Year Review. The amendments of concern include: 1) giving binding policy direction to the Board; 2) handing over powers to Yukon; 3) imposing maximum timelines for assessments; 4) and not requiring assessments when a project is renewing or being amended. These new amendments were introduced with little opportunity to ensure adequate consultation and accommodation.

On February 26, 2014, Canada arrived at a meeting and provided paper copies of these amendments and refused to provide electronic versions to the First Nations that were on the phone for the meeting. This stopped those First Nations not present in the room from being able to participate in a meaningful way.

Yukon First Nations had less than 2 months to review and respond to the changes proposed by Canada. That is not enough time to review important changes to the YESAA law. Consultation means providing the necessary information to the Parties. Canada didn’t do that step. Canada failed to meet the test of its Treaty and common law duty to consult and accommodate.

**Myth: The amendments in Bill S-6 come from the YESAA Five-Year Review**

**Reality:** Bill S-6 has 40 clauses for amending the YESAA. Over 75 percent of these proposed amendments have nothing to do with the YESAA Five-Year Review. All of the amendments that are of concern were not part of the Five-year Review.

**Myth: The Parties agreed on 73 of the 76 recommendations from the Five-Year Review.**

**Reality:** This statement has been used to suggest that the changes under Bill S-6 are reasonable and speak to the majority of First Nations’ concerns. It is wrong to view the level of agreement from the Five-Year Review like a score sheet for consultation and accommodation of First Nations concerns over the proposed amendments in Bill S-6.

The majority of the recommendations in the Five-Year Review had to do with changing policies and procedures, or starting new work to support the YESAA process and nothing to do with changes to the law.

**Myth: “Beginning-to-End” time limits for assessments will provide predictability for proponents, and, in turn, promote economic certainty and investor confidence.**

**Reality:** The YESAA process already includes time lines for each specific step in the process. The YESA Board and Designated Offices have mostly met these time lines.

Often, the delays in assessments are associated with the time required for proponents to prepare responses to information requests. Projects that have taken the longest in assessment processes are those that didn’t have enough information. Establishing “beginning-to-end” time lines may speed these projects through the assessment process, but this will result in rushed assessments that will not fully address potential environmental or socio-economic impacts. It may also result in a greater number of rejections of project proposals or referral to a Panel of the Board if assessors cannot determine the significance of possible impacts. This will not promote economic certainty or investor confidence.

Approval of large projects often requires a water licence. The Water Board process and other regulatory review and approvals occur after the YESAA review has been done and adds to the total time of assessments. The amendments Canada proposes will not change this added time and will not address the bigger issue of coordination between YESAA process and water licensing.

**Myth: The handing over of power under Bill S-6 should not be a problem since Yukon First Nations have already agreed to Devolution, and Canada has no immediate plans to hand over powers.**

**Reality:** The Yukon Devolution Transfer Agreement (YDTA) was carefully negotiated and crafted to deal with specific matters and does not address environmental review matters and does not deal with the operation of the YESAA.

To be consistent with the treaties and devolution arrangements, Yukon First Nations must be equal partners with Canada and Yukon in decisions concerning delegation of authority. Having no plans to delegate is little comfort.

**Myth: First Nations should not worry about these changes as a violation of the Treaties, since the YESA Act already has a clause stating; “In any event of an inconsistency or conflict between a final agreement and this Act, the agreement prevails to the extent of the inconsistency or conflict (section 4, YESAA)”.**

**Reality:** Although the reference to the clause is accurate, and the Final Agreement shall prevail in any inconsistency or conflict, the only way to resolve this when it arises would be to take the matter to the courts.

**Myth: Yukon First Nations have had over a year and $100,000 in financial support from Canada to consider the four controversial amendments that they oppose.**

**Reality:** As summarized in the timeline below, the various meetings relating to the five-year review of YESAA and the proposed amendment of YESAA were held over a period of twelve months. But Canada proposed four controversial amendments as part of Bill S-6 that were only discussed at the very end of the engagement with the Yukon First Nations and only provided them in writing to those Yukon First Nations physically in attendance less than 2 weeks before Bill S-6 was introduced to the Senate for first reading.

* Canada initiated its consultation on amendments to YESAA on May 30, 2013. The first draft bill did not contain any of the four controversial amendments that Yukon First Nations currently oppose.
* During the first face-to-face meeting, Canada confirmed that it would only be contemplating those changes to YESAA that were included in the draft bill dated May 30, 2013 , and they were not accepting Yukon Government’s proposed amendments dated December 12, 2012.
* On September 23, 2013, Canada advised Yukon First Nations that it was changing its approach to amendments and was considering the Yukon Government’s proposals and would meet with First Nations to discuss in more detail.
* During the next meeting on November 26-27, 2013, Canada introduced three of the four amendments that Yukon First Nations are currently opposed to (i.e. imposing maximum timelines for assessments, ministerial powers to give binding policy direction to the YESA Board, and authorizing the federal minister to delegate authority to a territorial minister). Two of these were based on Yukon Government’s proposed amendments (binding policy direction and delegation of authority). These proposals were only described in very general terms as presented in bullet form on a power point presentation. At this meeting, Yukon First Nations objected to the inclusion of these concepts.
* Yukon First Nations did not see the proposed amendments in detail until they were brought in person and only in paper form at the meeting held on February 26-27, 2014.  This meeting was the first introduction of the exemption of assessment for project renewals.
* First Nations that did not attend the meeting on February 26-27, 2014 in person did not receive copies, and those who were present were prohibited from copying them. Therefore, people on the phone could not participate in a meaningful way.
* Despite Yukon First Nations opposition to the three concepts presented at the November meeting, Canada pursued those amendments with insufficient rationale.
* Canada subsequently returned to host a meeting on April 2, 2014, but had clearly stated that this meeting would only be provided to give further explanations or to provide clarity on Canada’s intent, and it would not be to provide a forum for any further negotiations between the Yukon First Nations and Canada.
* The deadline for final comments was set for April 23, 2014. Funding provided had to be spent by March 31, 2014. The funding for consultation referenced by Mr. Leef and Minister Valcourt was primarily for a period when Yukon First Nations were not informed about the controversial amendments.
* There were only 22 business days left in the funding period when the amendments were presented to Yukon First Nations. Most Yukon First Nations used a considerable amount of the funding reviewing earlier iterations of the draft bill not related to the four amendments that were added at the very end of the engagement process.
* On May 23 2014, Canada presented Bill S-6 to Yukon First Nations after the consultation period. We were surprised to see Canada slip in a substantial change to the maximum timelines provisions that now includes the time period when the Board is considering if the proposal is adequate. Canada promised during consultation this period would not be included. Its inclusion effectively shortens the time available to provide our views during the seeking views stage of assessments.

It should be pointed out that the various Yukon First Nations governments were committed to meet with Canada as a group throughout this period in order to make the process effective and efficient. Otherwise, Canada would have been required to meet individually with each Yukon First Nation governments to discuss the proposed amendments to YESAA and this would have been a costly and protracted the process. In the end, an effective and efficient consultation process is not defined by timelines and funding if the consultations are not based on good faith and the commitment to work together to address the concerns of the various parties, including the Yukon First Nations. That is the objective of the consultation process.

**Myth: MP Ryan Leef stated that he was directly involved in consultations with Yukon First Nations before Bill S-6 was introduced into the Parliamentary process and, as a result, he heard the concerns of Yukon First Nations and took those concerns to the Minister (radio interview Dec. 4, 2014, 12:15 p.m. reporter Sandi Colman, CBC).**

**Reality**: There was no direct consultation between Mr. Leef and Yukon First Nations governments about any proposed amendments to YESAA prior to the introduction of Bill S-6 into the Senate for first reading. Some documentation was carbon copied to his attention. A meeting occurred with MP Leef in August of 2014 after Bill S-6 had already been introduced in the Senate.

**Myth: Projects in the Yukon that require permit or licence renewal automatically trigger another YESAA assessment.**

**Reality**: This matter was identified by Yukon Government during the five-year review of YESAA and was resolved with a recommendation that all parties agreed to and is already being implemented. (Recommendation 15B [p.24] of the YESAA Five-Year Review: Draft Review Report – Interim March 31, 2012).

**Myth**: **MP Ryan Leef characterized Yukon First Nations saying: we support the majority of Bill S-6; that the Bill S-6 arises from the five-year review of YESAA; and that we support 90% of Bill S-6.**

**Reality:** Yukon First Nations have never made these statements. For the record, we reiterate that Yukon First Nations do not support Bill S-6 as it stands. The four controversial amendments that Yukon First Nations oppose represent fundamental changes to the YESAA process and, therefore, Bill S-6 is unacceptable as long as it contains those amendments.

**Myth: Yukon First Nations should not be concerned about changes to YESAA through Bill S-6 as they will have guaranteed participation through the Board appointments.**

Federal and territorial elected officials and some Senators have referred to the idea that First Nations have guaranteed representation through the YESAA process as we have three of the seven seats for the Yukon Environmental and Socio-economic Assessment Board (“YESAB”) appointments. However, the YESAB is a **public** body. Under the land claim agreement, the persons nominated and appointed to the Board are not delegates of the party that nominated them. In particular, the First Nation nominees do not represent the interests of First Nations. They are responsible to carry out their functions as set out in YESAA.

Furthermore, the nominations are subject to acceptance by the Minister for the final appointment. If the Minister is not content with the person being nominated, that nominee is rejected. Regardless of nominations to the Board, the guaranteed participation objective from Chapter 12 encompasses the entire assessment process and not just through Board appointments. The view that the guaranteed participation objective from Chapter 12 relates to Board appointments is extremely narrow and limiting.

In any event, the majority of YESAA reviews are carried out by the six designated offices throughout the Yukon. There are no First Nation nominees as part of these designated offices.

NOTE: This document is only intended to provide general information to the public. It is not a legal statement or representation of the positions, assertions or opinions of any Yukon First Nation or the Council of Yukon First Nations and, therefore, it must not be relied upon in any legal proceedings.

FOR MORE INFORMATION VISIT OUR WEBSITE AT: <http://cyfn.ca/services/yesaa/>