



TESLIN TLINGIT COUNCIL

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**September 19, 2014**

**PADDLING OFF IN THE WRONG DIRECTION: Report of the Teslin Tlingit Council to the Senate Standing Committee on Energy, the Environment and Natural Resource on *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***

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## EXECUTIVE SUMMARY

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In 1973, along with the Nisga'a Nation, Yukon First Nations pioneered the rebirth of modern treaty-making in Canada by embracing the opportunity promised by Canada's then-new Comprehensive Land Claim Process. After more than 20 years of negotiations, Teslin Tlingit Council ratified the Final Agreement in the spirit of reconciliation and the hope of a bright, progressive, and sustainable future for our people.

One of the unique promises of the Teslin Tlingit Council and other Yukon First Nation Final Agreements was that a 'made in the Yukon' environmental and socio-economic assessment process would be established to link assessments in ways that were consistent with, and that would support the proper implementation and continuance of, other Final Agreement rights. It was a bold decision to abandon established environmental and socio-economic assessment processes and legislation in favour of new assessment processes and a new law customized to be consistent with Yukon Final Agreements, Yukon Self Government Agreements, and First Nation laws. For that reason, the Parties wisely agreed that there would be a comprehensive review of the YESAA after five years of implementation. The purpose of the review was for the parties to determine, in collaboration, whether the first iteration of this legislation fulfilled the promises set out in Chapter 12, and the Final Agreements generally.

Instead of fulfilling these important purposes, Canada has introduced in the Senate *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*, a bill that fails to meet the high standard of the Final Agreements, and which was unilaterally drafted without appropriate involvement or consultation with First Nation governments. The Bill raises serious constitutional, legal, and cultural concerns for the Teslin Tlingit Council. It is inconsistent with the objectives, interpretation, and intention of the Teslin Tlingit Council Final Agreement, which specifically gives rise to the YESAA, and includes amendments, apparently driven by the Action Plan to Improve Northern Regulatory Regimes ("APNRR"), that are inconsistent with constitutional law including Canada's long standing relationship with and responsibility to Teslin Tlingit Council.

Amendments included in Bill S-6 go beyond the scope of the Five Year Review, which was about improving the YESAA regime to better meet the objectives of Chapter 12 of the Final Agreements, and are not being introduced to achieve valid legislative objectives. This will result in infringements that cannot be legally justified under section 35 of the Constitution.

Specific concerns of the Teslin Tlingit Council include the following:

1. The amendments fail to meaningfully address the most important recommendations made by First Nations during the Five Year Review.

2. The amendments demonstrate steps by Canada to significantly limit its role and responsibilities under the YESAA in ways that do not accord with the relationship established under the Final Agreement.
3. The amendments give Canada the power to unilaterally impose enforceable and binding policies on the Board, effectively altering the balance of power between governments promised in the Final Agreement, and compromising the independence of the Board.
4. The amendments do not provide appropriate guidance to considerations respecting the potential infringement of Final Agreement and Aboriginal rights.
5. The amendments allow for the repeated submission of projects where the proponent fails to provide adequate information.
6. The amendments create a broad exemption from assessments for renewals and amendments of permits or authorizations.
7. The amendments fail to provide appropriate guidance to proponents to consider impacts on Final Agreement rights in order to plan their projects accordingly.
8. The amendments include a number of ill-considered new timelines that are being introduced into the legislation rather than through appropriate, jointly-developed regulation or Board policy.
9. The amendments fail to appropriately address on-going issues around land use planning and may result in serious infringements as a result.
10. The amendments provide broad powers to the Board to access a First Nation's sensitive, confidential Traditional Use information.
11. The amendments regarding cumulative effects do not sufficiently provide surety about the information required to consider cumulative effects at the landscape level.

The unilateral amendments provided for in the Bill, and the process of their implementation, are the antithesis of the shared governance approach that was promised in the Final Agreements. They ignore the specificity of the Yukon context and the binding Final Agreements of the Nations who were convinced that these Agreements would bring about a better future. Yukon First Nations entered into these treaties with the assurance of appropriate, objective, and comprehensive assessments to protect the sustainable future of their Traditional Territories. This disregard for First Nation concerns is emblematic of a continued lack of understanding of the North, and the intentions of the modern land claim agreement meant to chart our way forward, together. We urge the Committee and the Senate to rethink this approach; it is time to recognize the economic potential and power of the North while respecting cultural values of the people who live here. The way to do so is through the fulsome, honourable, and generous enabling of the Final Agreements.

## **INTRODUCTION**

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On June 3, 2014, Canada introduced *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* (the “Bill”) in the Senate of Canada. The Bill makes numerous amendments to the *Yukon Environmental and Socio-Economic Assessment Act* (“YESAA”) that raise serious constitutional, legal, and cultural concerns for the Teslin Tlingit Council because:

- a) they are inconsistent with the objectives, interpretation, and intention of the Teslin Tlingit Council Final Agreement, to which Canada is a party, and which specifically gives rise to the YESAA;
- b) the YESAA is a cornerstone of the Teslin Tlingit Council Final Agreement, and the changes Canada proposes undermine the purposes and promises of other important Chapters of that Agreement and therefore the treaty as a whole;
- c) they are inconsistent with constitutional law including Canada’s long standing relationship and responsibility to Teslin Tlingit Council;
- d) they constitute an effective withdrawal of Canada as a meaningful party from responsibilities agreed to in the Teslin Tlingit Council Final Agreement;
- e) they were developed and proposed in a manner that offends the Teslin Tlingit Council Final Agreement, and failed to meet Canada’s duties to deal in good faith and consult meaningfully with Teslin Tlingit Council.

The amendments set out in the Bill demonstrate a general lack of appreciation for how case law and constitutional law has evolved since the YESAA was enacted, including how comprehensive modern treaties are to be interpreted and implemented.

## **THE PROMISE OF A MODERN COMPREHENSIVE TREATY**

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In 1973, along with the Nisga’a Nation, Yukon First Nations pioneered the rebirth of modern treaty making in Canada by embracing the opportunity promised by Canada’s new Comprehensive Land Claim Process. Beginning in 1992, after more than twenty years of complex and challenging negotiations, Canada, Yukon and Yukon First Nations entered into these historically progressive treaties. Teslin Tlingit Council borrowed millions of dollars to finance Teslin Tlingit Council’s costs of conducting decades of negotiations. Those funds have been repaid in full, plus interest.

In total, Teslin Tlingit Council and other First Nations were prepared to borrow over a hundred million dollars because of the extraordinary and unique promises Canada and Yukon made over the course of these negotiations. One of those unique promises was

that a 'made in the Yukon' environmental and socio-economic assessment process would be established in order to link assessments in ways that were consistent with, and would support the proper implementation and continuance of, many other Final Agreement rights and retained Aboriginal rights and title on Settlement Lands. To be clear, a major incentive for Teslin Tlingit Council to enter into the Final Agreement and accept Settlement Lands was the assurances that the YESAA would help protect the broader Traditional Territory in ways laid out in the Final Agreement; that was the promise and the understanding of the Parties when it was ratified.

The YESAA's purpose was clear from the outset. This legislation was the primary implementation instrument for the promises made by the governments of Canada and Yukon in Chapter 12, Development Assessment, of the Teslin Tlingit Council Final Agreement. Chapter 12 links environmental and socio-economic assessments with, at minimum, the following Final Agreement Chapters: Forestry, Land Use Planning, Fish and Wildlife, Heritage, Internal Overlap and Trans-boundary, Special Management Areas, Water Management, Non-renewable Resources, Economic Development Measures and Yukon Indian Self-Government. Canada's proposed unilateral amendments also undermine the Teslin Tlingit Self Government Agreement, and compromise Teslin Tlingit laws made pursuant to that agreement.

Because the YESAA is a cornerstone implementation measure for so many treaty undertakings, in so many different Chapters of the Final Agreement, the amendments proposed by Canada not only deviate from the intentions and objectives of Chapter 12, they undermine the integrity of the Teslin Tlingit Council Final Agreement as whole. Teslin Tlingit Council takes the view that these proposed amendments are a breach of the Teslin Tlingit Council Final Agreement.

## **THE PROMISE OF THE FIVE YEAR REVIEW**

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There is little doubt that it was a bold decision to abandon established environmental and socio-economic assessment processes and legislation in favour of new assessment processes and a new law customized to be consistent with Yukon Final Agreements, Yukon Self Government Agreements, and First Nation laws. For that reason, the Parties to the Final Agreements wisely agreed that there would be a comprehensive review of the YESAA after five years of implementation. The purpose of the review was for the Parties to the Final Agreements to determine, in collaboration, whether the first iteration of this legislation fulfilled the promises set out in Chapter 12, and the Final Agreements generally. If appropriate, remediating legislative change would result. In Canada's proposed amendments, this logical and prudent purpose has been swept aside in favour of legislative change naively intended to facilitate industrial development across

the Canadian North, as expressed by the Action Plan to Improve Northern Regulatory Regimes (“APNRR”).

Northerners have lots of experience with having our lives, businesses, natural resource development and economies manipulated from afar by past colonial governments in Ottawa. The APNRR is just the latest expression of Canada’s public policy intentions to stimulate economic development and growth across the North. It is exactly this kind of partisan-driven, unilateral policy initiative that the parties to the Final Agreements intended to avoid when they agreed to create an arms-length ‘made in the Yukon’ environmental and socio-economic assessment process. As evidence of this disjoint between the APNRR and the purpose intended for this round of the YESAA amendments, consider the intentions stated by Canada in the APNRR, and for its proposed amendments in the Bill:

*Making reviews of projects more predictable and timely;  
Reducing duplication for project reviews;  
Strengthening environmental protection; and  
Achieving meaningful Aboriginal consultation.*

APNRR makes no mention of Canada proposing amendments that support the unique and special role of the YESAA as a key implementation measure necessary for making the Crown’s undertakings throughout the Final Agreements successful and meaningful.

Curiously, “Aboriginal consultation” is mentioned as a goal. As will be noted elsewhere in this report, it is Teslin Tlingit Council’s conclusion that the amendments proposed by Canada will make environmental and socio-economic assessments less conducive to meaningful Aboriginal consultation. Indeed, Teslin Tlingit Council has concluded that the opposite will transpire. Consultation with First Nations, which must occur before, during, and after environmental and socio-economic assessments are performed, will instead be seriously compromised by imposed new timelines and the unilateral imposition of policy by a distanced party.

Increasingly, compromised Crown consultation has become the subject of litigation between the Crown and First Nations and other Aboriginal groups. So too have Crown decisions that violate treaty arrangements. The bystander in these disputes between governments is usually industry. Any legislative or regulatory agenda that does not firstly focus on enabling Final Agreement rights and facilitating the Crown’s duty to consult and accommodate in keeping with the honor of the Crown, will fail in its more narrow economic development goals. Honoring treaties and fulfilling the Crown’s duty to consult and accommodate First Nations is the foundation of sustainable natural

resource development and investment, and the achievement of reconciliation.

Canada has not embraced the opportunity originally intended for the Five Year Review, that any legislative or regulatory amendments arising from it would act as vehicles to ensure that YESAA would fulfill the promises set out in the Teslin Tlingit Council Final Agreement. Our national government has instead embarked on a naïve, 'made in Ottawa' approach that has little to do with the treaty to which Canada is a party. The result of this well-worn colonial practice will be economic and political instability due to increased conflict and litigation instead of prosperity for northerners and Canadians. This is an unnecessary consequence that Teslin Tlingit Council wishes to help Canada, and all Canadians, avoid.

## **ACHIEVING RECONCILIATION: THE LEGAL CONTEXT**

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### **1. The Role of the YESAA**

The expectation in the Teslin Tlingit Council Final Agreement, and the reason for the Five Year Review, is that the Parties would consider the YESAA in the context of whether or not that Act properly and sufficiently fulfilled the promises set out in the Final Agreement. To the extent that it failed to do so, Teslin Tlingit Council understood that all Parties would collaborate, as was the case in the creation of the original legislation, on amendments that would make the YESAA sufficient and successful at fulfilling and implementing the promises of Chapter 12 and the overall intention of the Final Agreement.

All amendments to the YESAA need to be justified in terms of their consistency with the Final Agreement, and offer enhanced opportunities to fulfill the provisions and objectives of Chapter 12 with the ultimate goal of reconciliation. It is the Final Agreement itself that remains paramount over time, deflecting extraneous political or policy concerns of the particular government in power from time to time, which is why these important matters are in the Final Agreement, and afforded the constitutional protections upon which Teslin Tlingit Council relies.

Teslin Tlingit Council's Report to the Committee is intended to identify where Canada has strayed from its obligations to Teslin Tlingit Council through this law and the Final Agreement, and to help bring Canada back on track in ways that reflect the honour of the Crown, while fulfilling the promises made in the Final Agreement.

The YESAA is a core piece of legislation in that it deals with the nexus between Final Agreement rights, constitutional rights, industrial development, cultural values, and



government to government relationships. The tremendous weight carried by the YESAA includes:

- a) Yukon and Canada officials making explicit use of its processes to gather information they believe is helpful in fulfilling their duties to consult, and potentially accommodate, for the potential negative impacts of developments on Section 35 rights;
- b) The rendering of recommendations by a tripartite-appointed but independent public body regarding economic promises made to First Nations under the Final Agreements and on the continuance of Final Agreement resource-related rights;
- c) Ensuring the spirit and intent of Chapter 12 of the Final Agreement, including its objectives, and the overall principles that guide the interpretation of the Final Agreement, are met through the assessment legislation operative in the Yukon; and
- d) Ensuring that development unfolds in ways that protect, support and guarantee the long-term protection and endurance of all Final Agreement rights and the Aboriginal rights and title retained on Settlement Lands.

For the YESAA to be effective, any amendments must be informed by the principles that apply to the interpretation of modern treaties.

## **2. The Interpretation of Modern Treaties**

The interpretation of modern treaties was discussed by the Supreme Court of Canada in *Quebec v. Moses*, in the context of the James Bay Treaty:<sup>1</sup>

When interpreting a modern treaty, a court should strive for an interpretation that is reasonable, yet consistent with the parties' intentions and the overall context, including the legal context, of the negotiations. Any interpretation should presume good faith on the part of all parties and be consistent with the honour of the Crown. Any ambiguity that arises should be resolved with these factors in mind.<sup>2</sup>

The Supreme Court of Canada continued to embrace this approach in a subsequent decision regarding modern treaty-making in *Beckman v. Little Salmon / Carmacks First Nation*,<sup>3</sup> which specifically included interpretation of the *Final Agreements*:

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<sup>1</sup> *Quebec (Attorney General) v. Moses*, 2010 SCC 17, at para. 7 [*"Moses"*], citing *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 76.

<sup>2</sup> *Moses*, supra note 1 at para. 18.

<sup>3</sup> *Beckman v. Little Salmon / Carmacks First Nation*, 2010 SCC 5, at paras. 10 and 12.

The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

A goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.<sup>4</sup> In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.<sup>5</sup> To put it bluntly, when interpreting the Final Agreement the goal is **reconciliation** and the YESAA is intended to assist and enable that goal – both through the process by which amendments are made, and through the Act itself and its practical outcomes.

When interpreting the YESAA, and determining whether or not it meets the objectives and the specifics of Chapter 12 (including when amendments are made), the parties must support the goal of the YESAA to provide for a development assessment process that:

recognizes and enhances, to the extent practicable, the traditional economy of Yukon Indian People and their special relationship with the wilderness Environment;

provides for guaranteed participation by Yukon Indian People and utilizes the knowledge and experience of Yukon Indian People in the development assessment process;

protects and promotes the well-being of Yukon Indian People and of their communities and of other Yukon residents and the interests of other Canadians;

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<sup>4</sup> *R. v. Marshall*, [1999] 3 SCR 456 at para. 78; Chief Justice McLachlin, in dissent, but not on this issue [“*Marshall*”].

<sup>5</sup> *Ibid.*

protects and maintains environmental quality and ensures that Projects are undertaken consistent with the principle of Sustainable Development;  
protects and maintains Heritage Resources;  
provides for a comprehensive and timely review of the environmental and socio-economic effects of any Project before the approval of the Project;  
avoids duplication in the review process for Projects and, to the greatest extent practicable, provides certainty to all affected parties and Project proponents with respect to procedures, information requirements, time requirements and costs;  
and  
requires Project 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.

An example of how placing these goals in a position of primacy works is that, while a timely review is very important to many proponents, reviews must also be comprehensive – and comprehensiveness, when required to protect and maintain environmental integrity and address socio-economic effects, may be more important than timeliness. An outcome focused on reconciliation would include the joint development of amendments that address timing and funding concerns raised by First Nations during the Five Year Review (which Canada refused to consider). Timeliness of reviews must also address the capacity of a First Nation to participate meaningfully and completely in the reviews. There is abundant evidence that the frequency, complexity, and sophistication of proponent-driven project reviews frequently overwhelms First Nation governments' abilities to respond in informed, competent ways. Reducing already-stressed timeframes, without first addressing First Nation financial and human resource capacity shortcomings, compromises subsequent Crown consultation and accommodation duties, and will unnecessarily lead to increased litigation (rather than providing efficiencies). Indeed, since the YESAA was enacted, there has been significant litigation that directly relates to the fulsomeness of assessments and the consequences of reviews of the sufficiency of the Crown's duty to consult about the same matters thereafter. Compressing the timeframes without also comprehensively addressing capacity shortcomings will only increase conflict between First Nations and the Crown, all of which will harm Yukon's investment climate and frustrate development.

### **3. The Protection and Sustainability of Resource-Harvesting Rights**

Both Yukon and Canada need to understand the important role that the YESAA plays in ensuring the continued exercise of constitutionally-protected rights is not rendered meaningless. As the legislation that assists in ensuring development is sustainable, the YESAA must be capable of ensuring the enhancement and sustainment over time of

those rights that are dependent on a thriving natural environment. Effectively, there are legal limits on the Yukon and Federal governments' ability to approve developments in Teslin Tlingit Council's Traditional Territory. When considering decisions that adversely impact or interfere with Final Agreement rights, Yukon and Canada must ensure that the exercise of Final Agreement rights remains meaningful now and into the future.

For example, section 16(4)(2) of the Final Agreement guarantees that:

“Yukon Indian People shall have the right to harvest for Subsistence within their Traditional Territory, and with the consent of another Yukon First Nation in that Yukon First Nation's Traditional Territory, all species of Fish and Wildlife for themselves and their families at all seasons of the year and in any numbers on Settlement Land and on Crown Land to which they have a right of access pursuant to 6.2.0, subject only to limitations prescribed pursuant to Settlement Agreements.”

In order to meaningfully practice those rights, there must be populations of fish and wildlife that are not merely ecologically sustainable, but available in surplus to allow for adequate harvest from these populations, as well. Further, in order for there to be this surplus, there must be sufficient appropriate habitat to generate that surplus. In order to achieve this, and the goals set out in section 16(1), impacts on the habitat must be consistent with the sustainment of each First Nation's needs, now, and into the future, including being consistent with future land use intentions of Final Agreement Nations.

While Decision Bodies under the YESAA retain their constitutional responsibilities to consult, and if necessary accommodate, First Nations regarding harmful effects on their Final Agreement rights, much of the analysis that assists them in making their determinations arises from the assessment work performed by the Board. When First Nations are not enabled to assist in those determinations, when timelines are shortened and requests for appropriate financing are rejected, the result is an assessment process that is dysfunctional, ultimately creating a situation of high legal and business risk for each and every development that proceeds in a First Nation's Traditional Territory.

## **SPECIFIC TECHNICAL PROBLEMS WITH THE AMENDMENTS**

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1. The Bill fails to meaningfully address the most important recommendations made by First Nations during the Five Year Review. All parties expended significant effort and time providing input and analysis to the review, but the proposed legislative changes: a) were developed unilaterally; b) ignore recommendations made by First Nations and not agreed to by Canada; and, c) include new amendments that were

not discussed in the Five Year Review, which are specifically problematic for First Nations.

The federal government considers the North to be the potential economic driver for Canada in the years ahead. This is based largely on the recognition that significant natural resources await exploitation in lands where First Nations and other Aboriginal groups hold constitutionally-protected rights. The failure to provide sufficient economic support to enable First Nation governments to fulfill the role of fulsome governmental and information providers in the assessment process will interfere and damage this potential, not enable it. Indeed, a purported purpose of APNRR was to strengthen Aboriginal consultation, but the proposed unilateral amendments will, on their face, have an opposite effect.

Matters raised by First Nations during the Five Year Review which Canada refused to address include:

- a) Mandated engagement of affected First Nations by Decision Bodies when considering a recommendation;
  - b) Appropriate funding to enable First Nation engagement in assessments; and
  - c) Timelines for future reviews of the YESAA.
2. The proposed amendments demonstrate a move by Canada to significantly limit its role and responsibilities under the YESAA.<sup>6</sup> This is problematic for a number of reasons:
- a. The YESAA is about more than environmental and socio-economic assessment; it is also about assessments that consider impacts on Final Agreement rights by proposed developments. This is why the objectives of Chapter 12 include the recognition and enhancement of the special relationship between First Nations and the wilderness environment, the use of the knowledge and experience of First Nations in the assessment process, and the requirement that a Designated Office consider “the need to protect the rights of Yukon Indian People pursuant to the provisions of the UFA” (FA 12.4.2.3). Canada, as a party to the Teslin Tlingit Council Final Agreement has both contractual and fiduciary obligations from which it should not be seeking to improperly remove itself.

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<sup>6</sup> See for example Bill at s. 6.1 (1) *The federal minister may delegate, in writing, to the territorial minister all or any of the federal minister’s powers, duties or functions under this Act, either generally or as otherwise provided in the instrument of delegation.*

- b. One of the roles of the constitutional division of powers is to protect the interests of local minorities from being overwhelmed by those of local majorities. Removing or reducing Canada's role directly risks having local majority interests supersede the Final Agreement and constitutionally-protected rights of First Nations. Yukon Government's actions have repeatedly demonstrated the mistaken belief that its obligations to Final Agreement Nations ended on the signing of the Final Agreements. Teslin Tlingit Council does not believe Canada can legally or honourably walk away from this relationship – this is clearly not what the signatories to the Final Agreement intended or expected. Teslin Tlingit Council can provide specific examples where Yukon Government has exercised its authority in ways where local majority interests have overridden economic benefits promised in our Final Agreement.

Teslin Tlingit Council opposed amendments that would seek to limit Canada's current obligations under the YESAA.

3. Canada is seeking powers to unilaterally create enforceable and binding policies on the Board, effectively altering the balance of influence and independence of the Board promised in the Final Agreement.<sup>7</sup> It is clear from the provisions of the Final Agreement addressing the YESAA appointments that First Nations expected a continued role from Canada in balancing representation around assessments and land use. It is the Board, as an independent tribunal, constituted by balanced appointments, that is supposed to be setting its rules and policies. That is the promise made in section 12.8.0 of the Final Agreement. The policy direction and framework for the YESAA generally is Chapter 12, in addition to the common law regarding treaty interpretation and implementation, all of which are informed by the intricate relationships Chapter 12 has with the whole treaty, with the Teslin Tlingit Council Self Government Agreement, and with Teslin Tlingit Council laws passed pursuant to those agreements. Teslin Tlingit Council therefore opposes amendments to give Canada unilateral policy-making powers.
4. In the test for the infringement of a treaty or Aboriginal right, once a court finds there has been an infringement, they must then determine whether the infringement is justified. At this stage, non-First Nation governments often argue that the broader society's "public interest" is the principal factor to be weighed in the justification test. In *Sparrow*, the Supreme Court of Canada found the "public interest justification to

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<sup>7</sup> See Bill at 34. The Act is amended by adding the following after section 121: *121.1 (1) The federal minister may, after consultation with the Board, give written policy directions that are binding on the Board with respect to the exercise or performance of any of its powers, duties or functions under this Act.*

be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test of justification of a limitation on constitutional rights” (at para 72). In *R v. Badger*, [1996] 1 SCR 771, the Supreme Court commented that it is even more important to properly justify infringements of treaty rights because “rights granted to Indians by treaties usually form an integral part of the consideration for the surrender of their lands” (at para 82). It was explained by Department officials that the addition of “First Nations” as those whose interests must be considered by a Designated Office in 42(1)(h) is intended to ensure that due consideration is given to non-Final Agreement First Nation rights; in that case, Teslin Tlingit Council would not oppose this amendment. However, we are concerned that the change as currently drafted may appear to give weight to the “public interest” position by specifically acknowledging the validity of a weighing as between those parties, and we would like assurances or clarity that this is not Canada’s intention. In reality, the objectives of Chapter 12, and constitutional law in Canada, clearly provide that there must be priority given to the protection of Final Agreement rights. Teslin Tlingit Council requests that this amendment be re-drafted to clarify that First Nation Final Agreement Rights must be given priority when considering whether any proposed infringement is justified.

5. One of the proposed amendments is to specifically clarify that, when assessments are cancelled because the proponent did not provide sufficient information, they may be submitted again.<sup>8</sup> There must be a limit on how many times a project can be re-proposed. If there is going to be “certainty”, and a project has major problems that the proponent cannot overcome or provide sufficient information on, there needs to be a point where governments, including Teslin Tlingit Council, or the Board no longer have to waste their time, money, and energies. Teslin Tlingit Council opposes this amendment.
6. The Bill includes an amendment to create a broad exemption from the YESAA for renewals and amendments of permits or authorizations.<sup>9</sup> This issue was discussed during the Five Year Review and the proposed amendment directly contradicts the agreed recommendations. All parties rejected the amendment and agreed the issue should be addressed through revisions to assessors’ policies and approaches to project scoping. Teslin Tlingit Council therefore requests that this amendment be removed.

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<sup>8</sup> See Bill at s. 10.

<sup>9</sup> See Bill at s. 14. The Act is amended by adding the following after section 49: 49.1 (1) A new assessment of a project or existing project is not required when 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 that would otherwise be subject to an assessment.

7. It would be helpful to proponents to require them to consider 42(1)(g) (consideration of impacts on Final Agreement rights) when preparing an application for a *designated office* (Bill at s. 15). Such consideration could assist in saving time and energy on a project that might not be appropriate, which further punctuates that 42(1)(g) should be playing a major role in assessments – given its centrality to the purposes of Chapter 12. The importance of 42(1)(g) also applies to projects that have effects on asserted or treaty rights outside Yukon (due to their proximity to the border). The YESAA and its regulations must ensure effects on Final Agreement and asserted rights, inside and outside Yukon, are clearly and thoroughly assessed or Chapter 12 will not have been effectively implemented.
8. There are a number of new timelines that are being introduced into the legislation (see Bill at s.16) rather than through Board policy. At the last minute, Canada changed the imposed timelines to include the time period when the Board is conducting its assessment of the adequacy of information to be used in an assessment. On the whole, it is inappropriate for government to legally bind the Board, other governments, and First Nations governments to legislated timelines, and these amendments unnecessarily create potential liabilities without any advance awareness of the specific context or complexity of any given project. As well, including the information adequacy period in the total allowed time period gives proponents the opportunity to “game” the system by dragging their feet and delaying the provision of information such that the Board ends up with inadequate time to perform assessments. There was no consultation with First Nations or the Board about inclusion of the adequacy assessment in these timelines and this step will result in increased litigation that will waste the time and money of all parties involved. We note that timelines are already included in the Board’s policies and regulations and, as foreseen in the Final Agreement, it is more appropriate that the Board be positioned to set timelines that allow it to prepare and perform complete and comprehensive assessments. Teslin Tlingit Council opposes amendments that impose new timelines on assessments and requests their removal so that a functional approach can be jointly developed.
9. Regional land use planning is one of the best tools for determining how development on the broader land base can occur in ways that minimally infringe upon Final Agreement rights. If planning is undertaken and rights and interests are balanced, any deviations are likely to result in more serious impacts on constitutionally-protected interests. While a project can be referred to the Planning Commissions to determine whether a project is in compliance, there is currently no direct requirement by an assessor to consider or make decisions guided by land use plans. The amendment to 81(2) is not particularly significant in that it doesn’t effectively change



the existing provision; however, the original section, and s. 44 of the YESAA, provide little guidance for when and how deviation from a land use plan would or could be appropriate. In all likelihood the legislation on this point fails to meet the spirit and intent of the Final Agreements, or will allow outcomes that are in breach of the honour of the Crown – and further they are likely, by the nature of the context, to be serious breaches.

A major issue for Teslin Tlingit Council is that the land use planning process has been grinding along at a very slow pace, while residential and other “spot” developments continue to “pop-up” which slowly but inexorably diminish Final Agreement rights. By the time land use plans are actually achieved, any deviation is likely to result in a high level of infringement of Final Agreement rights (i.e. rising to the level of actionable impacts noted by the Supreme Court of Canada in the *Mikisew* decision and more recently in *Keewatin*). Now is the right time to address this problem. To the extent that land use plans represent significant mitigations that the Crown can bring forth as accommodations in subsequent consultations with First Nations, the reverse is also true. Deviations from land use plans are inherently serious, requiring a higher level of consultation and likely more substantial accommodations to compensate for that deviation. The failure to implement and complete land use planning, as promised by the Final Agreement, is resulting in the steady expansion of significant potential legal damages.

10. Section 31(2) of the Bill seems to provide sweeping powers to the Board to access a First Nation’s sensitive, confidential, internally-collected Traditional Use information;<sup>10</sup> Teslin Tlingit Council has been told that this is not what was intended and it seems to conflict with the requirement that there be agreements as to confidentiality put in place between parties sharing information. The current drafting is too broad to provide comfort to Teslin Tlingit Council, particularly in a situation where, in the past, the Board has come on as a full party opposing a First Nation in a judicial review (see, for example, the Selwyn judicial review). There can be little doubt that both the Board and Decision Bodies need to have appropriate access to Traditional Use information and this must be done and considered in culturally appropriate ways with legal protections in place to ensure that there is appropriate respect and care for this knowledge. Teslin Tlingit Council therefore opposes this amendment in the current form.

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<sup>10</sup> See Bill at s. 31(2) Section 112 of the Act is amended by adding the following after subsection (2): (3) *Subject to any other Act of Parliament, territorial law or first nation law, the executive committee may obtain from any first nation, government agency or independent regulatory agency any information in their possession that the executive committee requires for the purpose of conducting a study or research.*

11. While the changes to 42(1)(d) (cumulative effects) are largely positive changes, it seems that the proposed amendments to 112(1) do not go far enough to provide certainty about the information required to consider and monitor cumulative effects over a landscape level. It is doubtful that any land use decisions in a traditional territory where, for example, Chapter 16 rights are guaranteed, can be justified in the absence of broad cumulative effects assessments. It is in all the parties' interests to be aware of the extent of impacts on the environment on which First Nations depend for the exercise of their rights. The risk of cumulative effects is that they increase and increase and, ultimately, new projects result in greater and greater infringements until a breaking point is reached – resulting in considerable liability for the Crown. In all cases, and particularly in assessing cumulative affects, explicit assessments of the effects on Final Agreement rights and related mitigations are essential and should be required.

## **THE FAILURE TO CONSULT**

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Consultation with First Nations about the proposed YESAA amendments was not consistent with the approach that is required for changes to legislation, an approach arising from First Nation Final Agreements. It is Teslin Tlingit Council's view that what was and is required is a joint approach to legislative development. In this respect, the Bill is a resounding failure.

The following points describe important aspects that demonstrate Canada's failure to meaningfully consult during the development of the proposed Bill:

Canada, Yukon and First Nations worked collaboratively during the first three stages identified above – the Review Preparation, Issues Scoping and Issues Analysis stages. The Parties worked collaboratively to design and plan the YESAA Review and guide the independent consultant working on the Review. The independent consultant considered and addressed input from First Nations. Canada and Yukon were reluctant to get into substantive discussions during the final phase of the Five Year Review – the Parties' Response phase. During this phase, the terms of reference for the Review required that Yukon and Canada work directly with First Nations to identify consensus recommendations from the Review. Both Canada and Yukon argued that they did not have adequate mandates to support substantive discussions with First Nations, but also argued that they could not get a mandate until they understood what First Nations wanted.

After a slow start, there were discussions by a multi-party working group in trying to develop a consensus Review Report that described the findings of the Review.

After some discussion, the parties agreed to create a drafting team to write the report.

Major First Nation issues (e.g., funding, role of First Nations in YESAA Decisions, future YESAA Reviews, referral of projects from the Development Office to the Executive Committee) remain unresolved. Canada and Yukon continue to argue that they have no mandate to resolve these issues. These were major issues for First Nations from the outset of the Review.

After preparation of the draft Review Report, Canada unilaterally decided to finalize the report. It asked for comments on the draft report and many First Nations provided comments. Canada then ignored almost all of those comments and issued the report as final, with CYFN's logo, even though First Nations had made it clear that they could not endorse the report with the major outstanding issues. Canada unilaterally concluded that the Review was complete.

Canada initially proposed a very narrow range of amendments to the YESAA, addressing its objectives from the APNRR. Though it stated that it was addressing outcomes from the Five Year Review, most of the agreed amendments were not included in the initial draft Bill.

The current Bill includes many changes that were not discussed in the Review. Many of these are amendments proposed by Yukon (e.g., delegation to Yukon, policy direction imposed by Canada) and raise significant concerns from First Nations. These proposals and the rationale for their inclusion were not raised by either Canada or Yukon during the Five Year Review. First Nations put their major issues on the table for discussion, while Canada and Yukon appear to have withheld their major issues and thereby avoided direct discussion with First Nations about them.

Canada has not used a collaborative approach in developing its proposed amendments. Many key First Nations issues have not been addressed by the proposed amendments.

An example of the inadequacy of Canada's approach can be found in the final steps of the development of the Bill, which included a meeting held on May 23, 2014 and the follow-up letter from the Minister of Aboriginal Affairs and Northern Development dated June 2, 2014.

The Minister's letter lists the May 23, 2014 meeting as a day when consultation took place. Teslin Tlingit Council's technical staff attended that meeting where the final proposed changes were "table dropped", allowing staff no time to review or complete analysis of the proposal in advance. They were told that this was the final version and that there would be no changes, despite any input they might provide. There were significant changes from the previous version that were not redlined or noted in any way. That approach was not consultation, it was dissemination of information.

The Minister further claimed in his letter that “the proposed amendments address all of the agreed upon recommendations for the legislation changes stemming from the... Five-[Y]ear Review.” We think this is a disingenuous comment. The Department’s staff made this claim during the May 23, 2014 meeting. They were reminded that certain amendments about which this was claimed had specifically not been agreed upon and that further amendments, which had never before been discussed, were included. Department officials acknowledged those deficiencies.

The Five Year Review was conducted because it was promised under 12.9.3 of the Final Agreements and under section 11 of the YESAA Implementation Plan. The purpose of the review was to: “examine Yukon’s development assessment process in its entirety and in the context of the objectives of the *UFA*.” The scope of the Review included examining aspects of the Yukon development assessment process including the following:

- i. The YESAA and its regulations;
- ii. The implementation, assessment and decision-making processes: the implementation plan, funding, opportunities for public participation in the process, phases and timelines, process performance expectations and process documents such as rules, guides, forms; and
- iii. YESAB, Decision Bodies and other participants: responsibilities, duties, functions, timelines and documentation.

Nowhere in the purpose or the scope of the Review was there mention of “the advancement of Canada’s Action Plan to Improve Northern Regulatory Regimes”; indeed, the scope set out in the terms of reference are purposely narrow, demonstrating the intention to consider the specific Yukon context. The amendments that go beyond the scope of the Review, which was about improving the YESAA regime to better meet the objectives of Chapter 12 of the Final Agreements, are not being introduced to achieve valid legislative objectives and will result in infringements that cannot be legally justified under section 35 of the Constitution.

The Final Agreement and all of the rhetoric leading up to its ratification promised a ‘made in the Yukon’ approach to environmental assessment in which First Nations would be equal partners in assessment and land management. The clear intention of the parties, including Canada, was that we would hold to a regime and principle of co-governance, with equally balanced roles for all governments that are a party to the Teslin Tlingit Council Final Agreement. We believed that constructive and collaborative government-to-government relationships would be the hallmark of the Yukon of the future.

## CONCLUSION

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The reason for the review of the YESAA, and subsequent amendments to the Act, is that the bold approach to development assessment negotiated in the Final Agreements over twenty years ago was so novel that there was reason to fear it might not fulfill the outcomes and objectives of Chapter 12 and the Final Agreement as a whole in its first iteration. The review was carried out to assist all the parties to the Final Agreements and to the YESAA to identify problem areas, and to work together to correct them. Furthermore, it is obvious that the constitutional and common law legal framework associated with development assessments and First Nations treaty and aboriginal rights has evolved. So too has the related body of law associated with the Crown's duties to consult with and accommodate First Nations where appropriate. These are, in themselves, sufficient reasons to review, reconsider, and amend this legislation. All amendments by Canada must be consistent with and be guided by these realities, and the imperative of getting the YESAA right, in the context of Chapter 12, and the entirety of the Final Agreement.

Therefore, Teslin Tlingit Council believes there is an obligation for Canada to prioritize amendments designed to improve the YESAA's likelihood of achieving the expectations of Chapter 12, its objectives, and the constitutional and fiduciary obligations arising under the Final Agreement. Teslin Tlingit Council's review of the proposed amendments suggests that they display a concern for other considerations on the part of Canada that have nothing to do with the efficacy of the YESAA in fulfilling the vision of the Final Agreements or honouring and protecting Section 35 rights; reconciliation appears to be an afterthought rather than a driver of Bill S-6.

The unilateral amendments and process of implementation are the antithesis of the shared roles and joint development of legislation that was promised. They ignore the uniqueness of the Yukon and the specific needs and binding Final Agreements of the First Nations who were convinced to believe that the Final Agreement would bring a better future. The disregard shown in Bill S-6 for First Nation concerns that are not addressed or consistent with APNRR is emblematic of a continued lack of understanding of Canada's Northern context. We urge the Committee and the Senate to rethink this approach; it is time to recognize the economic potential and power of the North while respecting the cultural values of the people who live here. The way to do so is through the fulsome and generous enabling of the Final Agreements to which Canada is a party.

Canada's decision to impose unilateral amendments will likely result in litigation that would be harmful to specific industrial projects and result in a general destabilization of Yukon's economic climate. Industry's ability to attract and keep investment flowing will

be further compromised as a result. The Bill unnecessarily creates conflict with Yukon First Nations that are generally positive and progressive toward natural resource-driven sustainable development. This results in a counter-productive and incompetent strategy for stimulating Northern industrial development. To be clear, certainty is being sacrificed through Canada's actions and not through the actions of Yukon First Nations.

The proposed YESAA amendments appear to be coordinated with numerous other amendments to Northern and Yukon legislation which, taken together, generally weaken the Final Agreement rights of Yukon First Nations in complex and pervasive ways and, therefore, are a breach of our Final Agreement. Reconciliation will not be achieved by proceeding down this road.

We respectfully request that the Committee reconsider Canada's priorities for amendments to the YESAA, in keeping with the promises set out in the Teslin Tlingit Final Agreement, by focusing on amendments that enhance YESAA's ability to fulfill its comprehensive roles noted therein. Failing that, Teslin Tlingit Council urges the committee to advise the Senate to reject this Bill outright for the reasons provided in this Report, and to direct Canada's officials to collaborate with First Nation officials with a mandate to revise YESAA as was originally intended.

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