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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

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill S-6
(Legislative Summary)

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1 BACKGROUND

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 (short title: Yukon and Nunavut Regulatory Improvement Act) was introduced in the Senate on 3 June 2014.

This bill is the third in a suite of legislation aimed at improving the regulatory regime in Canada's northern territories in accordance with commitments set out in the federal government's 2010 Action Plan to Improve Northern Regulatory Regimes.[1] It follows:

- Bill C-47, An Act to enact the Nunavut Planning and Project Assessment Act and the Northwest Territories Surface Rights Board Act and to make related and consequential amendments to other Acts,[2] which received Royal Assent in June 2013; and
- Bill C-15, An Act to replace the Northwest Territories Act to implement certain provisions of the Northwest Territories Lands and Resources Devolution Agreement and to repeal or make amendments to the Territorial Lands Act, the Northwest Territories Waters Act, the Mackenzie Valley Resource Management Act, other Acts and certain orders and regulations,[3] which received Royal Assent in March 2014.

The objective of Bill S-6 is to update the regulatory regime in Yukon and Nunavut and align it with other regulatory regimes throughout Canada. It is composed of the following two parts:

- Part 1 proposes a series of amendments to the *Yukon Environmental and Socio-economic Assessment Act*; and
- Part 2 proposes amendments to the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*.

1.1 *YUKON ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT ACT*

The *Yukon Environmental and Socio-economic Assessment Act*[4] was established under the *Umbrella Final Agreement Between the Government of Canada, the Government of Yukon and Yukon First Nations*.[5] The Act sets out an assessment process for all lands in Yukon.

Responsibility for the management of land and resources was devolved from the federal government to the Government of Yukon in 2003, and the

Yukon Environmental and Socio-economic Assessment Act was passed that same year. Under the terms of the Umbrella Final Agreement, a comprehensive review of the Act by the parties to the agreement was required within five years of the Act becoming law. That review was completed in March 2012.[6]

According to departmental documentation, Bill S-6 reflects agreed-upon recommendations arising from the review of the Act and follows a year of consultations on the legislative proposal with the Government of Yukon, First Nations, the Yukon Environmental and Socio-economic Assessment Board and industry.[7] Specifically, the documentation states that this legislation:

- introduces legislated time limits for assessments consistent with other federal environmental assessment legislation;
- provides the Minister of Aboriginal Affairs and Northern Development with the authority to provide binding policy direction to the Yukon Environmental Socio-economic Assessment Board, to equip the Government of Canada to communicate expectations on matters such as board conduct, use of new technology, and fulfilment of roles and responsibilities related to Aboriginal consultation;
- allows for a board member's term to be extended for the purpose of completing a screening or review to ensure both quorum and continuity;
- enables the Government of Canada to develop cost recovery regulations so that costs incurred for public reviews are borne by the proponents of development projects and not the taxpayer; and
- reduces regulatory burden by clarifying that a project need not undergo another assessment when a project authorization is to be renewed or amended unless, in the opinion of the decision body or bodies, there is a significant change to the project.[8]

1.2 *Nunavut Waters and Nunavut Surface Rights Tribunal Act*

The *Nunavut Land Claims Agreement* was signed in 1993 between the Government of Canada, the Government of the Northwest Territories and Nunavut Tunngavik Incorporated (NTI), which represents all Inuit beneficiaries of the agreement. The NTI has a number of formal governance functions under the agreement, and manages the subsurface portions of lands on behalf of all the Inuit beneficiaries of the agreement.

At NTI's request, a working group was created to review proposed amendments to the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*.[9] According to Aboriginal Affairs and Northern Development Canada, as a result of meetings and discussions with NTI, Regional Inuit Associations, the Nunavut Impact Review Board, the Nunavut Planning Commission and industry, "[a] number of adjustments have been made to the proposed amendments in response to the comments and concerns" expressed.[10] The amendments proposed in Bill S-6:

- introduce time limits for water licence reviews;
- increase existing fines associated with water licences;
- add an administrative monetary penalties regime;

- allow for “life-of-project” water licences;
- require the Nunavut Water Board to take into consideration agreements between Canada, regional Inuit associations and proponents regarding posting of security to address the issue of “over-bonding,” where more than one regulatory agency requires financial security for the same project; and
- establish a cost-recovery regulation-making authority.[11]

2 DESCRIPTION AND ANALYSIS

Bill S-6 is organized in the following manner:

- clause 1, which contains the short title of the bill, the Yukon and Nunavut Regulatory Improvement Act;
- clauses 2 to 40, which contain Part 1, amending the *Yukon Environmental and Socio-economic Assessment Act*; and
- clauses 41 to 56, which contain Part 2, amending the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*.

The following description highlights selected aspects of the bill; it does not describe every clause.

2.1 PART 1 OF BILL S-6: *YUKON ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT ACT*

2.1.1 DELEGATION

Under new section 6.1, the federal Minister of Aboriginal Affairs and Northern Development[12] may delegate, with written notice, any of his or her powers, duties or functions under this legislation to the territorial minister.

2.1.2 ACTING AFTER EXPIRY OF TERM

New section 10(4) allows members of the executive committee or a panel of the Yukon Environmental and Socio-economic Assessment Board (YESAB) whose term expires while they are conducting a screening or review to continue acting until a decision document is issued. New section 11(4) has the same effect, but it applies to members whose membership terminates because they no longer meet the residency requirements under section 9 of the Act.

2.1.3 TIME LIMITS AND ASSESSMENT PROCESS

Sections 30(1)(*d*) and 91(2)(*f*) are amended to require that the YESAB make rules relating to the periods within which the executive committee, panels and designated offices must act for each step from the submission or referral of a proposal to the conclusion of the screening, review or evaluation of the project.

2.1.3.1 Matters to Be Considered

Current section 42 states that among the matters that must be considered when conducting an assessment is the significance of any adverse cumulative environmental or socio-economic effects in connection with the project in combination with projects or activities that have been carried out or are being carried out in or outside Yukon. This section is amended by adding new text to require considering the impacts of projects "likely to be carried out" as well (section 42(1)(*d*)).

Definitions are not provided for the terms "likely to be carried out" or "likely" timeframe, nor is the manner in which cumulative impacts of such potential projects can or will be measured specified.

2.1.3.2 Requiring Additional Information

New sections 43(2) through 43(6) give powers to the YESAB to suspend, and ultimately terminate, assessments where a project proponent fails to provide requested supplementary information within prescribed time limits.

2.1.3.3 Authority and Validity

New section 46.1 provides that the failure of listed persons or bodies to act within a period specified in the proposed Act does not terminate their authority or invalidate actions undertaken by them in performing their duties and functions.

2.1.3.4 No Significant Change

Under new section 49.1, a new assessment is not required for the renewal or amendment of a project authorization unless, in the opinion of the decision body or bodies, there is a significant change to the project. The legislation does not state what would constitute a "significant change" to a project or what information and input the decision body must take into account when assessing whether a new assessment is required.

2.1.3.5 Conclusion of Evaluation

Section 56 is amended to establish timelines regarding the decision-making process surrounding project applications. A designated office has nine months from the day a proposal is submitted to complete its evaluation of a project. The federal minister may extend this limit by a maximum of two months, on request from the YESAB, and the Governor in Council may extend the time limit further, on the recommendation of the minister. Where a proponent is required to provide information or undertake a study, the time needed to do so is not included in the calculation of the time limit or any extension granted.

2.1.3.6 Conclusion of Screening

Section 58 is similarly amended with respect to screenings by the executive committee. The executive committee has 16 months from the day a proposal is

submitted to complete its screening of a project. At the YESAB's request, this time may be extended by the federal minister by two months, and it may be extended further by the Governor in Council on the recommendation of the minister. Where a proponent is required to provide information or undertake a study, the time needed to do so is not included in the calculation of the time limit or any extension.

2.1.3.7 Requirement or Request for Review

Sections 61 to 64 are replaced to remove references to the *Canadian Environmental Assessment Act* (which, under new section 6, no longer applies to Yukon) and to update references to section numbers and text to ensure consistency with amendments made throughout Bill S-6.

2.1.3.8 Time Limit

New section 66.1 establishes time limits within which the executive committee must establish a panel of the YESAB and complete its terms of reference. This must be done within three months of being required to do so in accordance with section 65(1) or 65(2). The federal minister may extend this limit by up to two months at the request of the executive committee, and time may be further extended for any length by the Governor in Council. Consistent with other time limits in this legislation, the time required for a proponent to comply with a request to provide information or undertake a study is not included in the calculation of the time limit or any extension granted.

2.1.3.9 Agreement: Coordination

New section 66.2 permits the executive committee to enter into agreements with other authorities for the purpose of coordinating the review of the effects of the part of a project to be conducted outside Yukon. Where the authority is a foreign state, the federal minister and the Minister of Foreign Affairs may enter into such coordination agreements.

2.1.3.10 Recommendations of a Panel

At the conclusion of a review, a panel of the YESAB or a joint panel established to review a project must recommend whether the project be allowed to proceed or not. Under section 72(4), the panel can make one of three recommendations:

- that the project be allowed to proceed, on the basis that it will have no significant adverse environmental or socio-economic effects in or outside Yukon;
- that the project be allowed to proceed, subject to specified conditions, on the basis that significant adverse environmental or socio-economic effects in or outside Yukon can be mitigated; or
- that the project not be allowed to proceed, on the basis that significant adverse environmental or socio-economic effects in or outside Yukon cannot be mitigated.

This section is amended by adding to the latter two options the possibility that the panel may find that a project “is likely to have” significant adverse environmental or socio-economic effects (section 72(4)(*b*) and (*c*)).

2.1.3.11 Time Limit: Panel of the Yukon Environmental and Socio-economic Assessment Board

New section 72(4.1) introduces a time limit within which a panel of the YESAB must make its recommendation: within 15 months of being established. Like other limitation periods in this Act, this time may be extended and does not include any time required by the proponent to comply with information requests (new sections 72(4.2) to 72(4.4)).

2.1.3.12 Time Limits

Section 77(2) is amended to fix time limits for the reconsideration of recommendations under section 77 at no more than 60 days for a screening by the executive committee or 90 days for a review by a panel of the YESAB.

2.1.3.13 For Greater Certainty

New section 88.1 is added for greater certainty, to ensure that it is understood that an independent regulatory agency, a government agency or a First Nation may impose terms and conditions additional to, or more stringent than, those set out in the decision documents, subject to the extent of their jurisdiction and authority to do so.

2.1.4 Cost Recovery

New section 93.1 gives the federal minister the authority to recover from proponents the costs associated with project reviews. The costs eligible for recovery, to be prescribed by regulations, would include salaries and expenses of YESAB and staff members related to the fulfilment of their functions and duties, and services of third parties. Costs to be recovered by the federal minister would constitute a debt to Her Majesty and may be recovered in court. Under new section 122.1, the federal minister is given the power to make regulations setting out the activities and services that would be subject to cost recovery.

2.1.5 Collaboration

The executive committee may conduct research or studies related to project activities upon the request of federal or territorial ministers or First Nations. New sections 112(1.1) and 112(3) give the executive committee the power to enter into collaboration agreements with other bodies with the consent of the ministers and First Nation requesting the research, and to obtain information from any First Nation, government agency or independent regulatory agency for this purpose, subject to any applicable laws. Section 113(1) is amended to require that the resulting report of any research be made available to the public “as soon as feasible” after submitting it to the minister or First Nation that requested it.

2.1.6 Policy Directions

New section 121.1 gives the federal minister the power to issue written binding policy directions to the YESAB after consulting with Board members. The directions, which must be published, do not apply with respect to active applications before the YESAB.

2.1.7 Transitional Provisions

Clause 39 of Bill S-6 contains transitional provisions. Project proposals that were submitted before the amendments set out in this bill come into force are governed by the Act as it read before the amendments were made. Proposals submitted after the amendments come into force are governed by the Act as amended. Clause 39(2) clarifies that the time limits apply to all project proposals, with the clock starting on the date the bill receives Royal Assent.

2.2 Part 2 of Bill S-6: *Nunavut Waters and Nunavut Surface Rights Tribunal Act*

2.2.1 Notice: On the Initiative of the Nunavut Water Board

The *Nunavut Waters and Nunavut Surface Rights Tribunal Act* (NWNSRTA) sets out the conditions under which the Nunavut Water Board (NWB) may issue, renew, amend or cancel water licences. New section 43.1 of the NWNSRTA requires that the NWB give public notice of its intention to consider, on its own initiative, whether to amend or cancel a licence either to address water shortages or where it considers the amendment or cancellation to be in the public interest. Notice is not required when the NWB and the Minister of Aboriginal Affairs and Northern Development[13] agree that the amendment or cancellation is required on an emergency basis.

2.2.2 Term of Licence

There are two types of water licences: type A and type B. An application for either is subject to review by the NWB before the NWB may approve the application and issue the licence. For a type A activity, which is likely to have more significant environmental effects than a type B activity, the project proponent must provide more information, and the application requires a public hearing. A type B water licence application does not require a public hearing, unless the NWB considers a public hearing warranted due to public interest.

The current maximum term for both types of licence is 25 years. Under amended section 45, the term of type A water licences may not exceed the anticipated duration of the project. The current maximum term would continue for type B water licences, as well as for type A licences prescribed by regulations.

2.2.3 Time Limits

New sections 55.1 through 55.6 address the time in which the NWB must make its decision about the following:

- applications for the issuance, renewal or amendment of type A or type B licences that require a public hearing; or
- where the NWB gives notice it intends to consider the amendment or cancellation of a licence.

The NWB must make its decision within nine months of an application being made or of a notice being given; an application is considered made when the NWB is satisfied that it meets all requirements set out in sections 48(1) and 48(2).

2.2.3.1 Commencement of Time Limit

If the NWB is cooperating and coordinating with the Nunavut Planning Commission, the Nunavut Impact Review Board, or a federal environmental assessment panel, the time limit does not begin until the relevant body has completed its screening or review of the project.

2.2.3.2 Suspension or Extension of Time Limit

The nine-month time limit may be suspended by the NWB in the circumstances set out in new section 55.5, including until any compensation requirements it determines the applicant must undertake under sections 58 and 60 of the NWNSRTA are met.

At the NWB's request, the minister may extend the nine-month time limit by two months, and the time limit may be extended further by the Governor in Council on the recommendation of the minister. Where a licence applicant is required to provide information or undertake a study, that time is not included in the calculation of the time limit or any extension granted.

2.2.4 Referral to Minister for Approval

Under amended section 56(1), the NWB's decision with respect to a licence must be immediately referred to the minister for approval.

2.2.5 Arrangements Relating to Security

New section 76.1 concerns the posting of security for projects situated partially or wholly on Inuit-owned land. Security bonds may be required to compensate eligible persons where a compensation agreement is not in place, and to provide for project site abandonment and any ongoing measures required after the project is concluded.

This new provision states that the minister can enter into arrangements with the designated Inuit organization and the applicant for the amount of the security to be provided and for its periodic review, taking into account any changes in the project or risk of environmental damage. A copy of the arrangement is to be provided to the

NWB, which must take it into consideration when determining the amount of security it may require for projects. This amendment, accordingly, requires the NWB to consider security bonds that are already in place between Inuit land owners, the Government of Canada and industry proponents, with a view to avoiding the requirement of more than one security bond for a project.

2.2.6 Cost Recovery

A cost recovery scheme is added to the NWNSRTA in new section 81.1 to recover costs associated with the consideration of a licence application from project proponents. Eligible costs, which are to be set out in regulations, would include NWB and staff salaries and expenses related to the fulfilment of their functions and duties, and third party services. Costs to be recovered by the minister would constitute a debt to Her Majesty. Under new section 82(1)(*r.1*), the Governor in Council, on the recommendation of the minister, is given the power to make regulations setting out the activities and services that would be subject to cost recovery.

2.2.7 Punishment

Replacement section 90 of the NWNSRTA increases fines for offences respecting the use of water, the deposit of waste and the failure to comply with the direction of an inspector. The current maximum fine of $100,000 increases to a maximum fine of $250,000 for a first offence and $500,000 for a second or subsequent offence.

The same fines apply to every type A licensee who contravenes any condition of a licence or fails to maintain the required security.

For a type B licensee, a first offence for contravening any condition of a licence or failing to maintain security is liable for a maximum fine of $37,500, and a second or subsequent offence is liable for a maximum fine of $75,000.

New section 90.4 provides that a conviction under the NWNSRTA is deemed to be a second or subsequent offence if the offender has been previously convicted of a similar offence under an Act of Parliament or the legislature of a province or territory that relates to environmental or wildlife conservation or protection.

2.2.8 Administrative Monetary Penalties

New sections 94.01 to 94.19 establish a scheme for administrative monetary penalties. This includes the statutory authority for the minister, with the approval of the Governor in Council, to implement the scheme through regulations designating what violations will be subject to administrative monetary penalties and the determination of amounts, or the method of determining amounts for violations.

2.2.8.1 Maximum Amount of Penalty

The maximum amount for administrative monetary penalties is $25,000 for individuals and $100,000 for any other person. A violation committed or continued on more than one day would constitute a separate violation for each day it is committed or continued.

2.2.8.2 Purpose of Penalty

The purpose of the penalties is to promote compliance with the NWNSRTA and not to punish. This point is further emphasized in new section 94.09, which advises that a violation is not an offence and, accordingly, that section 126 of the *Criminal Code*, which provides that disobeying an Act of Parliament is an indictable offence punishable by up to two years' imprisonment, does not apply.

2.2.8.3 Violations

A number of provisions are dedicated to providing details regarding violations and the issuance of notices of violation, and to the process for a ministerial review. Violations would include contraventions of provisions of the NWNSRTA or its regulations, contraventions of any order, direction or decision made under the NWNSRTA, or failure to comply with a term or condition of any licence.

2.2.9 Right to Request Review

A ministerial review asking for a review of the amount of the penalty or the facts of the violation, or both, can be requested within 30 days after the day the notice of violation was served (or the period prescribed by the regulations). If, upon review, the minister determines that the amount of the penalty for the violation was not determined in accordance with the regulations, the minister must correct the amount. A determination by the minister is final and binding, subject only to judicial review under the *Federal Courts Act*. The NWB will be allowed to make details regarding administrative monetary penalties public.

2.2.10 Transitional Provision

A transitional provision is set out in clause 54. It states that the time limits provided for in new section 55.2 of the NWNSRTA will apply to licence applications when clause 44 comes into force, which is one year after Bill S-6 receives Royal Assent or at an earlier date by order of the Governor in Council.

2.3 Coming into Force

Most of the bill will come into force when it receives Royal Assent. The following sections of the NWNSRTA will come into force one year after the bill receives Royal Assent, or at an earlier date fixed by the Governor in Council:

- section 43.1, concerning notice requirements where the NWB intends to consider, on its own initiative, the amendment or cancellation of a licence;
- section 45, addressing the terms of licences;
- sections 55.1 and 56, which set time limits for licence decisions and approvals by the NWB;
- section 47, which introduces a cost recovery mechanism; and
- section 48, concerning the power of the Governor in Council to make regulations with respect to classes of licences and amounts to be recovered under cost recovery measures.

NOTES

1. Aboriginal Affairs and Northern Development Canada [AANDC], "Harper Government Invests in Northern Jobs and Economic Growth," News release, 6 November 2012.
2. Bill C-47: An Act to enact the Nunavut Planning and Project Assessment Act and the Northwest Territories Surface Rights Board Act and to make related and consequential amendments to other Acts, 1st Session, 41st Parliament (S.C. 2013, c. 14).
3. Bill C-15: An Act to replace the Northwest Territories Act to implement certain provisions of the Northwest Territories Lands and Resources Devolution Agreement and to repeal or make amendments to the Territorial Lands Act, the Northwest Territories Waters Act, the Mackenzie Valley Resource Management Act, other Acts and certain orders and regulations, 2nd Session, 41st Parliament (S.C. 2014, c. 2).
4. *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7.
5. *Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon*, 1993.
6. AANDC, *Yukon Environmental and Socio-economic Assessment Act Five-year Review*.
7. AANDC, *Bill S-6, Yukon and Nunavut Regulatory Improvement Act: Proposed Amendments to the* Yukon Environmental and Socio-economic Assessment Act *(YESAA)*.
8. Ibid.
9. AANDC, *Bill S-6, Yukon and Nunavut Regulatory Improvement Act: Proposed Amendments to the* Nunavut Waters and Nunavut Surface Rights Tribunal Act.
10. AANDC, *FAQ: Bill S-6 – Yukon and Nunavut Regulatory Improvement Act*.
11. AANDC, *Bill S-6, Yukon and Nunavut Regulatory Improvement Act: Proposed Amendments to the* Nunavut Waters and Nunavut Surface Rights Tribunal Act.
12. The *Yukon Environmental and Socio-economic Assessment Act* states, "Minister of Indian Affairs and Northern Development."
13. The *Nunavut Waters and Nunavut Surface Rights Tribunal Act* states, "Minister of Indian Affairs and Northern Development."