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Dr Hayden King,

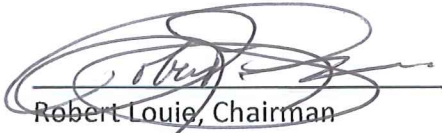
On behalf of the Lands Advisory Board and First Nations Land Management Resource Centre, First Nations organizations responsible for providing political and technical support to the 165 signatory First Nations to the Framework Agreement on First Nation Land Management (Framework Agreement), we respectfully present this letter to the Yellowhead Institute regarding misleading information that we have encountered in your most recent publication *The Rise of the First Nations Land Management Regime in Canada: A Critical Analysis* by Shalene Jobin and Emily Riddle.

We first wish to thank you and the authors and wish to acknowledge the hard and extensive work that went into your analysis. However, whether it was done knowingly or unwittingly, the omission of important contextual information relevant to the conclusions of this report results in a biased portrayal of the true nature and intent of the Framework Agreement. Though we do have some concerns about numerous inaccuracies and misleading statements contained in this publication, this also allowed us to see that further efforts may need to be undertaken on our part in order to elucidate some of our activities and raise awareness on the significance of the Framework Agreement, its origins and applications including its fundamental social, economic and legal changes across the First Nations landscape.

In the hopes that this can be an opportunity for us to build bridges and work collaboratively in rectifying inaccurate or incomplete important information on the Lands Advisory Board, the First Nations Land Management Resource Center, and the First Nations Land Regime, we are pleased to present you with a detailed response, in which we offer some clarification on specific areas of your report.

We invite you to review our response, attached in annex, and we hope to further discuss with you and your team, at a time of your convenience, the many ways in which we hope to work together.

Sincerely,



Robert Louie, Chairman  
Lands Advisory Board



Austin Bear, Chairman  
First Nations Land Management Resource Centre

cc: Operational and Developmental First Nations to the Framework Agreement on First Nation Land Management  
Yellowhead Institute Board of Advisors  
Dr Pam Palmater, Chair of Indigenous Governance, Ryerson University  
Chris Anderson, Dean, Faculty of Native Studies, University of Alberta  
Shalene Jobin  
Emily Riddle

## ANNEX 1

Response and clarification of some areas in the report:

1. *“In December 2018, the First Nations Land Management Act was amended, lowering the voting threshold for ratification and giving First Nations increased flexibility in investing or spending funds generated under the First Nations Land Management Act.” (p.2)*

### Clarification:

While the reference to the amendment of First Nation Land Management Act (FNLMA) is correct, critical information is omitted in the report, including the following:

- The FNLMA is Canada’s Ratification of the Framework Agreement on First Nation Land Management. No First Nation operates or is subject to the FNLMA.<sup>1</sup>
  - The FNLMA was amended in 2018 to follow changes to the Framework Agreement that were requested and supported by the operational First Nation signatories to it. This took many years and much effort by First Nations, the Lands Advisory Board (LAB) and the First Nations Land Management Resource Centre (RC).<sup>2</sup>
  - The changes to the Framework Agreement were made regarding transfer and control of Capital Monies held by Canada and not “investing or spending funds generated under the First Nation Land Management Act”.<sup>3</sup>
2. *“Also, by opening up reserve lands to the market, it may further contribute to the dispossession of land for First Nations people.” (p.2)*

### Clarification:

This statement is not accurate, there is no change to the effect of market forces on reserve land under a land code. Lands under a land code are still protected by 91.24 of the Constitution and hence cannot be alienated to, seized or owned by non-members of a First Nation. While it is possible that a First Nation operating under its own land code could decide to increase its economic development, there is no substantive change to how defaults are dealt with on reserve compared to those First Nations operating under the *Indian Act*. Operational First Nations are in a better position to increase land protections.<sup>4</sup>

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<sup>1</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTIONS 48.1 (B) AND 48.2

<sup>2</sup> [SEE SENATE STANDING COMMITTEE ON ABORIGINAL PEOPLES TRANSCRIPT OF EVIDENCE BY COUNCILLOR WILLIAM MCCUE REGARDING BILL C86 ON NOVEMBER 21, 2018](#)

<sup>3</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTIONS 12.8 AND 12.10

<sup>4</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTION 2.3



3. *“In our view, as treaty people, the threat of the First Nations Land Management Regime is that it overwrites our treaty history and obligations” (p.5)*

*Clarification:*

It is important to note that First Nations structured the Framework Agreement specifically to ensure that it would not impact, define or express treaty or Aboriginal rights of First Nations. Hence there is no “overwriting” of treaty history or obligations.<sup>5</sup> In this statement it is implied that “Treaty People” are aligned in their thinking, while in other parts of the paper it is acknowledged that the Framework Agreement is not a treaty.

The Framework Agreement simply aims to remove the application of lands provisions of the *Indian Act* which, do interfere with and “overwrite” the exercise of established Treaty rights and obligations. The Framework Agreement recognizes that First Nations have an inherent authority to govern, while the *Indian Act* does not.<sup>6</sup>

4. *“This opens up reserve lands to further development (of course this is one of the main motivations for First Nations to enter the process).” (p.5)*

*Clarification:*

While it is true a First Nation could decide to increase its economic development under a land code, unless the authors have polled all 165 First Nations, it is questionable to assume that all 165 signatory First Nations to the Framework Agreement have been motivated by only or primarily economic development to “enter the process”.

As stated previously, the Framework Agreement is about governance.

5. *“Operational funding to support the implementation of a Land Code and corresponding laws is generally agreed to every five years for a fixed amount, so it is not guaranteed that a First Nation will always be able to access this funding or to what extent.” (p.5)*

*Clarification:*

The Framework Agreement does refer to the provision of funding by Canada, including ongoing negotiation and no time limitations are specified.<sup>7</sup> In 1996 when the Framework Agreement was concluded with Canada, funding in individual agreements were determined in 5-year blocks just like all funding relating to First Nations at the time.

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<sup>5</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTIONS 1.3, 1.4, 1.5 AND 1.6

<sup>6</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTION 21

<sup>7</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTIONS 29, 30, 39.1

More recently, discussions have been opened up to 10-year grant authorities. This has not been implemented without its own controversy. The operational First Nations of the Framework Agreement are taking a cautious approach to this principle.

6. *“Ultimately, the aim of the First Nations Land Management Act is to put reserve land on the global market, subjecting communities to increased market forces.” (p.6)*

*Clarification:*

This is not accurate.

- The FNLMA only ratifies the Framework Agreement – it has no application to First Nations<sup>8</sup>
- The ultimate aim of the Framework Agreement is to remove the lands provisions of the *Indian Act* and replace it with First Nation created laws, rules and procedures. Facilitated decision making by community members over land use planning, law development, conservation, protection, management and development is the benefit.<sup>9</sup>
- Not all signatory First Nations are motivated by economic development.<sup>10</sup>
- “Communities” are already subject to market forces and too much subject to non-Aboriginal governments; “lands and resources” subject to the Framework Agreement are controlled by the community.

7. *“Though the First Nations Property Ownership legislation has not been introduced by the federal government, some of the same logics are at play in the First Nations Land Management Regime.” (p.7)*

*Clarification:*

It is unclear what “logics” are being referred to in the report but yet being linked to the FNLMA Regime. There is a chasm of difference between the foundations of the Framework Agreement and the proposed First Nation Property Ownership Act (FNPOA). Equating them as logically similar is not a fair statement in our opinion, further, the Framework Agreement First Nations have consistently opposed the FNPOA.

8. *“One reason could be related to rendering void the fiduciary responsibility that the federal government holds to First Nations related to the aspects included in the regime.” (p.7)*

*Clarification:*

Canada’s fiduciary obligation is not rendered void. While it is diminished by the decisions exercised by First Nations under a land code, the Framework Agreement specifies that there is a continued application of section 91.24, meaning that elements of the fiduciary relationship continue, as does the “special relationship” referred to in the Framework

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<sup>8</sup> FNLMA SECTION 4(1)

<sup>9</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT PREAMBLE AND SECTIONS 18 AND 21

<sup>10</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTION 5



Agreement.<sup>11</sup> Under a land code, First Nations are responsible for their own decisions and cannot fault federal officials for decisions they no longer make.

9. *"It should be noted that it is band councils elected under the Indian Act that have the power to opt into the First Nations Land Management Regime. Though it is generally agreed upon that First Nations need to be able to exert more jurisdiction and control over governance, we are being offered this increased control through an imposed governance system..."* (p.7)

**Clarification:**

- While a community's Chief and Council can indeed pass a resolution to become a signatory to the Framework Agreement, only the membership of a community can "Opt In" i.e. ratify the Framework Agreement and a Land Code.<sup>12</sup>
  - Land Codes are not imposed governance systems; they specify what areas should be addressed by laws, policies and procedures; they do not specify the language, process or governance system that guides them. Land codes are uniquely drafted by each community and while there are similarities, they are not "one size fits all".<sup>13</sup>
10. *"Given this state of affairs, there is an important point to make here: many First Nations who have implemented a Land Code tout the ability to create their own laws as a major benefit, but we question to what extent these reserve land management laws correspond to Indigenous legal systems."* (p.8)

**Clarification:**

Indigenous legal systems and their application in land codes are decided by First Nations not third parties.<sup>14</sup>

11. *"The removal or alienation of Indigenous peoples from their full territories through the First Nations Land Management Regime or other processes that enable capitalist pursuits produces analogous results. It is clear that the First Nations Land Management Regime exists because of this logic"* (p.8)

**Clarification:**

This is an unsupported and inaccurate statement.

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<sup>11</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTION 1.4 AND 2.3

<sup>12</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTIONS 5, 6 AND 7

<sup>13</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTION 5

<sup>14</sup> SEE ARTICLE 3 [United Nations Declaration on the Rights of Indigenous People](#)  
FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTION 5

First Nations who are signatory to the Framework Agreement have not relinquished any rights or title relating to their full territories.<sup>15</sup>

The Framework Agreement was designed to remove the lands provisions of the *Indian Act* in favor of First Nation created laws, policies and procedures, this is the logic for the existence of the Framework Agreement.<sup>16</sup> It does not set out to, and does not by any interpretation, remove or alienate anyone from First Nation lands.

12. *“Aspiration for economic development is the key component in consideration for entry into the First Nations Land Management Regime.”* (p. 10)

*Clarification:*

Other equally weighted considerations of land activity contained in the now defunct 2014 questionnaire not mentioned in the report include:

- Protection of First Nation Lands and Resources
- Governance and Communication with Members
- Land Issues
- Environmental Issues and Environmental Management
- Experience with Land Administration under the *Indian Act*
- Governance Aspirations<sup>17</sup>

13. *“Importantly, under FNLMA the federal government ceases to have a fiduciary duty related to the aspects of land dealt with in the Act.29”* (p. 10)

*Clarification:*

The fiduciary obligation is not rendered void. While it is diminished by the decisions exercised by First Nations under a land code, the Framework Agreement and the continued application of section 91.24 means that the fiduciary relationship is also continuing.<sup>18</sup>

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<sup>15</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTION 1.6

<sup>16</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT PREAMBLE

<sup>17</sup> [HTTP://PUBLICATIONS.GC.CA/COLLECTIONS/COLLECTION\\_2013/AADNC-AANDC/R3-192-2013-ENG.PDF](http://publications.gc.ca/collections/collection_2013/aadnc-aandc/R3-192-2013-ENG.PDF)

<sup>18</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTIONS 1.4 AND 2.3



14. *“Considering this, it is questionable that an initiative of this scope could be approved through the consent of one quarter of the band membership, which has been the case.” (p.10)*

**Clarification:**

The now defunct imposed requirement for “25% plus one” of eligible voter for yes votes was a minimum threshold, not a maximum. For many First Nations, historical turnout for votes demonstrated that 25%+1 was an impossible standard.

In alignment with other important First Nation related votes in Canada, the imposed minimum percentage was removed in favor of First Nation communities deciding their own minimum percentage of required “yes” votes and voter participation. First Nations are obligated to demonstrate that all reasonable efforts have been taken to locate and inform eligible voters of their right to vote and the manner in which that right can be exercised.<sup>19</sup>

15. *“With the 2018 amendments, the default approval does not require a minimum percentage of community participation. Therefore, as long as a council publishes notice of the vote, even if only ten eligible voters come out to vote, and a majority of voters approve, then the Land Code and Individual agreements will come into effect.” (p.10)*

**Clarification:**

This is incorrect and has also never occurred. While public notice of vote is required, First Nations are also required to demonstrate that all reasonable efforts have been taken to locate and inform eligible voters of their right to vote and the manner in which that right can be exercised. Ratification votes cannot be certified without compliance to these principles.<sup>20</sup>

16. *“That being said, these are communities that have, by and large, demonstrated a relationship with their lands very specifically tied to capitalist and often resource extraction ideologies. This is, after all, a precondition for approval.” (p. 11)*

**Clarification:**

This has not been the case for the majority of the 91 First Nations that have passed land codes. Further, economic development is not a precondition for a First Nation to become a signatory to the Framework Agreement.<sup>21</sup> The LAB and RC supports the inclusion of any First Nation regardless of the nature of their aspirations, that wishes to avail themselves of the Framework Agreement option.

<sup>19</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTIONS 7.3 AND 7.4

<sup>20</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTIONS 7.3 AND 7.4

<sup>21</sup> [HTTPS://LANDSADVISORYBOARD.CA/INTERESTED-FIRST-NATION/](https://landsadvisoryboard.ca/interested-first-nation/)



17. *"The First Nations Land Management Regime fails to deal with Indigenous territory that extends beyond Indigenous reserves, and as such, is not in alignment with Indigenous understandings of continued jurisdiction for both Numbered Treaty nations and those without similar agreements with the Crown."* (p. 12)
18. *"In the assertion the crown makes over lands, which are stolen lands, we find real problems with the First Nations Land Management Act based on that foundation."* (p. 13)

**Clarification:**

The Framework Agreement is not a treaty, and as such, it was never intended to be a vehicle to affect treaty discussions, stolen lands or to resolve the implementation of any specific treaty in any province. Its only intent was to remove the imposition of the *Indian Act* in favor of First Nation created laws.<sup>22</sup>

19. *"There is legitimate concern that by signing the Framework Agreement on First Nations Land Management, a First Nation acknowledges that title to reserve land is currently under the jurisdiction of the Crown."* (p.13)

**Clarification:**

This statement confuses two concepts while at the same time is unfounded. Title and jurisdiction are not the same. Parliament has legislative jurisdiction over "lands reserved for the Indians", including lands that can become subject to the Framework Agreement.

Title to reserve lands, as defined in the Indian Act, is in Her Majesty who holds them for the use and benefit of First Nations. According to the Supreme Court of Canada, Indian reserve lands are also subject to Aboriginal title. The last two facts act as restraints on how federal jurisdiction can be exercised. These are all pre-existing facts which remain true whether a First Nation signs the Framework Agreement or not. Signing the Framework Agreement neither enhances or diminishes them. The status quo is preserved.<sup>23</sup>

20. *"Certainly, notions of communal land tenure are discouraged and there is a push towards conceptualizing the land as a productive, economic asset that should be owned."* (p.15)

**Clarification:**

There is nothing in the Framework Agreement that discourages communal land tenure. First Nations that ratify it can create new tenures, extend or limit existing ones, and otherwise govern their lands and resources as their communities wish to do. Communal tenure is a legitimate option that many First Nations preserved even though notionally controlled by the *Indian Act*; in fact, nearly half of the First Nations in Canada at one time rejected the Indian Act/CP system. Under the Framework Agreement, they remain free to do so.

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<sup>22</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTION 1.3

<sup>23</sup> FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT SECTION 1.6