Peskotomuhkatiyik

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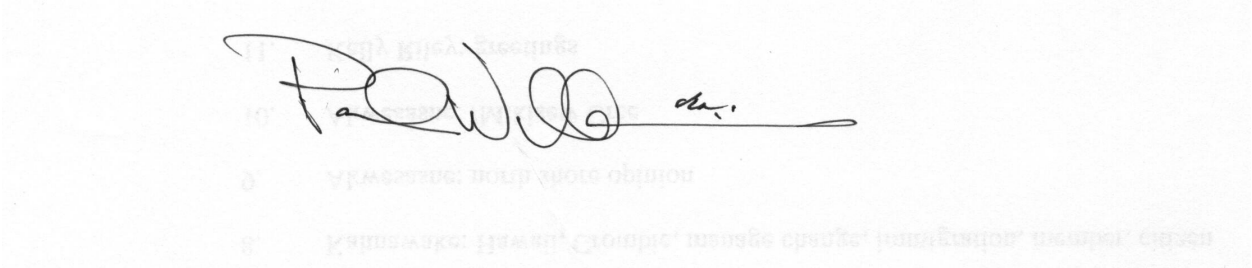
On April 21, 2022 we were contacted by the Clerk of the Senate Committee on Fisheries. We were told that the Committee was studying Indigenous fisheries, and that it wanted our input by April 29 at latest. We were not told what the focus or purpose of the study is, nor who was doing it, nor what had been done to date.

We're taught not to use sharp words in speaking with our friends and partners. In addressing this issue, it's hard not to. It's been a rough couple of COVID years, a frustrating six years of unproductive negotiations, a bitter seventeen year fight for recognition, and a tough three centuries of dispossession. We have friendship and commitment from local and regional Department of Fisheries and Oceans employees – and inflexible, unimaginative policies and decisions from people in Ottawa that prevent any meaningful progress. This isn't the way a treaty relationship is supposed to work.

In the ten pages we were asked to provide, all we can do is deliver a brief overview of a difficult and complex issue. Please feel free to get in touch with us if you would like more information.



Dark Beginnings

By 1800, the Crown ceased to be a respectful treaty partner with the Peskotomuhkati. The relationship that had been formed in 1725 provided for the peaceful coexistence of two very different societies in the watershed of the Skutik (St. Croix) River.[1] The Peskotomuhkati used all the land and all the waters, but with a light ecological footprint. "Nomad" is the wrong word to describe a people who would be in the same places at the same times each year, following the cycle of the seasons and the times that different foods would be available. The English were building small, permanent agricultural and fishing settlements. It was logical that the two peoples would not only promise not to "molest" each other, but they would work together. That is the essence of the treaty relationship – likutawakon, making family, helping each other.

In 1785, a flood of United Empire Loyalist refugees entered the territory.[2] Seeing choice locations already cleared, they settled upon them. When the Peskotomuhkati arrived at those places in their annual round, they were excluded. The Crown made some small reserves: at the Salmon Falls near present-day St. Stephen, where the people stayed for about a month and a half every summer, and at Qonaskamkuk, St. Andrews, the nation's fire place, its base for weirs to take the abundant fish of Passamaquoddy Bay, and the clams and dulse of the rich beaches. In 1802, the reserve at the Salmon Falls was quietly sold by the provincial government to the Anglican Church, and the river was dammed there for a cotton mill. The many species of migrating fish were reduced to a trickle. The reserve at St. Andrews was simply never formally set apart, and the people were pushed aside. By the 1930s, there were still about thirty Peskotomuhkati houses there, on the wrong side of the railroad tracks, near the town dump. By 1990, there was one family of eight brothers and sisters left. The Town of St. Andrews brought a court action to "clear title" and reduced the area from about 90 acres to five acres for the eight to share.[3] The Canoose Reserve and the St. Croix Reserve, about 300 acres in total, were administered by the federal government as Indian reserves pursuant to the *Indian Act*. Canoose was sold without a surrender in 1937; St. Croix was simply given by Canada to New Brunswick in 1944.[4]

It was not only a matter of being disconnected from the land. Where white fishermen were getting licenses from the Crown, Peskotomuhkati fishers and hunters were being excluded and prosecuted for doing exactly what the treaties said they could do without molestation.[5] As a result many of the people moved away, first to Indian Island, then to Deer Island, and finally across the river to Maine.

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[1] Canadian courts and governments tend to see "treaties" as individual transactions, where Indigenous legal systems see them as relationships, punctuated by reaffirmations and occasional adjustments. In 1990, the Supreme Court of Canada provided a kind of "checklist" in the *Sioui* case (1990 SCC 103) for which transactions qualify as "treaties." In 2005, the court began to see one of the post-Confederation "numbered treaties" as the beginning of an ongoing relationship that would "manage change" for the future, in the *Mikisew Cree* decision (2005 SCC 69).

[2] New Brunswick became a separate province in 1784. By the next year, the European population of the province had quadrupled.

[3] The town kindly installed its sewage treatment plant beside the five acres, and leased other land adjacent to them for a recreational vehicle park.

[4] The two claims were formally made in 2007. They were accepted for negotiation by the Minister of Indian Affairs in 2018. Formal negotiations may have begun more than four years later.

[5] Few Peskotomuhkati cases were reported. But the conviction of the Grand Chief of the Mi'kmaq Nation, Gabriel Syliboy, in 1927 (1928 NS SC 352) stands as an example of the ugliness of Canadian law – a denial not only of treaty rights but of the capacity to make treaties at all. The position was rejected, with mild regret, by the Supreme Court of Canada in the *Simon* case (1985 SCC 11) , and Syliboy was posthumously "pardoned" in 2017 by the Government of Nova Scotia.

The present-day Peskotomuhkati communities of Sipayik and Motahkamikuk became a "federally recognized tribe" in the United States as a result of a settlement in 1980. As for he people who stayed in Canada, when Parliament ordered "band lists" to be compiled in 1951, no effort was made to do so in Peskotomuhkati country. The result is an anomaly: an Indigenous nation with treaty relations with the Crown, but without the recognition as "Indians" and a "Band" that other treaty nations receive from the Government of Canada. The result of this exclusion has been even more poverty and marginalization.[6]

Aboriginal rights

The burden of proving that a practice is an "Aboriginal right" as defined in Canada's 1982 constitution is upon the Indigenous people claiming that right. They have to prove that the practice was integral to their distinctive society at the time they first met Europeans. "Integral" means it was so important that they would not be the same people without it. And it can't be anything that is so important to all human societies.

Of course this is racist and unfair on many different levels. What is so special about Europeans that meeting even one of them jells your people's rights for all time to come, when meeting an African, an Asian or a Quechua has no legal effect at all? Why should "Indians" have to prove the importance of their practices at that moment of "first contact," when Métis only have to prove it at the time when the Crown established effective control over the area[7] – which can be nearly three hundred years later? What is fair about having to prove the things that are most important to you based on the writing of complete strangers, carrying their own political and religious agendas, often your enemies? Isn't this the Doctrine of Discovery in a thin disguise, a racist theory that the federal and provincial governments have promised to abandon?[8] A good demonstration of another aspect of the unfairness of this would be to ask an average Canadian what things they consider integral to the distinctive society of Canada. The answers will probably include democracy, health care, hockey, education and family. So you eliminate the last two (they're values shared by every society), and ask for proof that the others were integral to the society three centuries ago. Representative democracy in Canada is less than two centuries old; public health care less than a century old; hockey was borrowed from Indigenous peoples. And all this without even the suggestion that "first contact," though fleeting, could have been with Norsemen or Basques, long before any written records. Shall a living people's rights be determined by archaeologists?

It's no wonder that by the time we end up in court, what is left to be recognized is what Canadian society decided was the nature of Indigenous peoples: hunt, fish, trap and gather.

Court. No Canadian government has ever implemented meaningful recognition and protection of Aboriginal rights without being forced to do so by a court. Access to the courts for Indigenous

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[6] Minister of Indian Affairs Andy Scott promised that his Department would do all in its power to recognize the people as "Indians" and the community as a "band" in 2005. The promise has not been kept.

[7] *R. v. Powley,* 2003 SCC 43.

[8] Australian law faced the racism head-on in the *Mabo* decision in 1992. A British Columbia court called it what it is in 2022 in *Thomas and Saik'uz First Nation v. Rio Tinto Alcan*, 2022 BCSC 15. though as in Australia, did not go so far as to demolish the structure.

peoples is relatively recent.[9] Access to the documentation to support the cases is equally recent.[10] Court can be prohibitively expensive. It can drain your resources and your will.[11] And when you get to court, you find the judges have been educated, selected and paid by your adversaries, and know only your adversaries' law.[12]

In Peskotomuhkati territory, the middens of clam shells, ten thousand years old, and the remains of fish weirs, also thousands of years old, are proof of the long, deep presence of a people whose way of life was intimately tied in with the ocean, the bay, and the rivers. The Peskotomuhkati have an Aboriginal right to fish for food, protected by the Constitution of Canada. The right has never been surrendered. It has never been "extinguished."[13]

The right to fish has another right that flows from it, one that is less frequently mentioned. If our right to fish is to carry with it the continuity that will allow it to be conducted by future generations, then there is also a right that <u>there will be fish.</u> In the Skutik River and the Bay of Fundy, salmon populations are either extinct or critically endangered. Other fish populations have been drastically depleted. In our territory, the only "fish" that are abundant enough to be taken commercially are the remaining bottom-dwellers, lobsters and scallops.[14] *The Aboriginal right to fish, to be properly protected, needs to be accompanied by responsibility and authority, and that includes the right to participate meaningfully in the management of the ecosystem.*[15]

We are told by Department of Fisheries and Oceans negotiators that their "mandate" does not permit them to have serious conversations about joint management of the ecosystem. They also refuse to take any stance on whether we have a legal right to participate in management decisions (see "consultation," below). The recent decision to "extend" the 2017 "mandate" means we will have no effective conversation for at least another year.

Treaty rights

Somehow, a culture has developed in Canada that perceives treaties as isolated one-shot transactions rather than organic, long-term relationships, and also sees the obligations as flowing in only one direction: Indigenous peoples demanding rights. Every once in a while one sees the slogan "we are all treaty people," but there has been little effort to really seek to understand the deep reciprocity that Wabanaki law requires in the family relationship. When the courts say the honour of the Crown is engaged in the treaties, we reply that our nations' honour is equally important and equally engaged.

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[9] Until 1951, Section 141 of the Indian Act made it a criminal offence to collect money from Indians to pursue claims without the permission of the Superintendent General of Indian Affairs. There is no record of that permission ever being given.

[10] Research funding for Indigenous organizations and communities began at roughly the same time as more open access to the records of the Department of Indian Affairs, in the mid-1970s. By that time, there were twelve shelf *miles* of records, often in disarray, misfiled or illegible.

[11] To get to the Supreme Court to test Aboriginal title to the most barren one-sixth of their land in 2014, the Tsilhqot'in Nation spent twenty years and $30 million (2014 SCC 42) In the *Cowichan Tribes* case, the Government of Canada relented and handed over an expert report halfway through the trial – 287 days in. (2022 BCSC 184)

[12] Chief Justice Lance Finch of British Columbia wrote *The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice,* 2019.

[13] For many Indigenous peoples the fire, with its many purposes from hearth to cooking fire to council fire, is one of the symbols of the life of the people. The Skutik River is named after the sacred fire that would burn at the Salmon Falls. For the Government of Canada to choose the word "extinguish" to describe the effect of its laws on those peoples is particularly ominous.

[14] Sakom Hugh Akagi is fond of pointing out that these are crustaceans and mollusks, not fish (he's a former federal fishery scientist). "I want my fish back," he says.

[15] We avoid the use of the word "resource," which reduces living beings to the status of fungible commodities.

In the 2004 *Haida Nation* decision, the Supreme Court of Canada said that making treaties is a means of reconciliation. However, we are concerned that the word "reconciliation" has taken on several very different meanings in Canadian law and Canadian society. Certainly it is important that we should all get along together. Certainly the horrors of residential schools and a long policy of "assimilation" – the deliberate destruction of Indigenous governments, cultures and languages – calls for Canadian governments and societies to apologize and atone. No, we do not agree with Justice Binnie of the Supreme Court that Indigenous peoples have to "reconcile themselves to Canadian sovereignty." The reconciliation that Canadian courts have identified as a constitutional goal is the effort to explain how the unilateral assertion of sovereignty by the Crown can be reconciled with the fact that there were already nations on this land, with their own laws, governments and sovereignty, and those continue to exist. The treaty relationships were indeed a means of establishing peaceful coexistence. Too many Canadians, including judges and politicians, think a "treaty" is only a real estate deal. Too many also see it like a divorce, a final contract – "we'll take the land and pay you this money, you go live on those reserves, and we will let you hunt and fish for a while" – instead of a marriage.

In the Atlantic provinces, the treaty relationship protects the coexistence of the Wabanaki and settler societies and their economies. It is recognized and affirmed by the Constitution of Canada. The treaties reaffirmed the Aboriginal right to fish for food. And then, according to Canadian courts, in 1760 they added protection of the right to engage in fishing for commerce.

In Canadian law, provincial laws govern most hunting.[16] Federal laws govern most fishing. Aboriginal and treaty *hunting* rights were given legal protection against provincial laws with the 1951 Indian Act, but Aboriginal and treaty *fishing* rights were not granted any effective protection until after the coming of Section 35 of the Constitution Act of Canada in 1982.[17] Even so, it took 34 years and the 1985 *Simon* decision for Canadian law to recognize Wabanaki treaty hunting rights, and 17 years and the 1999 *Donald Marshall* decisions to recognize treaty commercial fishing rights.

Though no fishing rights have ever been surrendered in either ocean, Canadian history and law have treated Indigenous Atlantic and Pacific fisheries very differently – and continue to do so. To explain why would take more time and room than we have been told we're allowed.

Donald Marshall Jr. and the "Aboriginal Fisheries Strategy"

Junior Marshall was the son of the Grand Chief of the Mi'kmaq Nation. He was wrongly convicted of murder and spent eleven years in Canadian prisons, protesting his innocence. An inquiry into his conviction identified systemic racism in Nova Scotia's criminal justice system. After his release, he moved home to take up a quiet life. Fishing was an essential aspect of that life.

When Canadian government officials say "Marshall," they are referring to the treaty right to fish for commerce that the Supreme Court of Canada identified in two decisions in 1999.[18] They seem to be

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[16] Migratory birds, as the subject of an international convention with the United States and Mexico, are federal.

[17] One of the problems was the late addition of the word "existing" to Section 35 of the Constitution Act. That allowed federal lawyers to argue that the section is an "empty box." They argued that any rights that had been abridged before 1982 were no longer revived. What the *Sparrow* case did was distinguish between rights that were "regulated" before 1982 and therefore could receive protection, and those that were "extinguished," and remained dead.

[18] *Marshall* is unique in Canadian law: after the original decision, the Supreme Court of Canada rendered a second decision, "clarifying" the first at the request of the commercial fishermen's associations that were intervenors in the case.

unaware that his fishing had many purposes. He fished for food for his family. He would provide fish to the elders, and to needy people in the community. He would fish for community feasts. He would sell only part of his catch. He was doing what Mi'kmaq and other Wabanaki people had done for generations.

That's important. Canadian fisheries policies and laws do not allow Indigenous fishers to engage in both food and commercial activities at the same time, unless there are separate licenses, with separate rules, for each kind of fishery. Canadian fisheries policies and laws are not designed to accommodate the activities of individual fishers in small boats who distribute part of their catch for food, and sell part.[19] Yet that kind of fishery is crucial to many Wabanaki families' way of life and survival.

In *Marshall,* the Supreme Court of Canada identified a Mi'kmaq treaty right to fish for a "moderate livelihood." It extrapolated that finding from the 1760 negotiations about a "truck house," a place where the Mi'kmaq could sell and trade fairly under the auspices of the Crown.

The Supreme Court's decision does not explain what a "moderate livelihood" consists of, nor where in the negotiations or written terms of the treaties the idea or the words appear. For more than twenty years, the federal government has avoided having the conversations that would give clear meaning to the words. In fact, it has tried to avoid talking about the treaties at all, and focused mainly on buying "access" to commercial fisheries for some Indigenous people.

In the *Marshall* decisions, the Supreme Court followed its own thinking in the *Sparrow* case nine years earlier. No rights are absolute, it said. In *Sparrow,* the court laid out a path whereby the Crown can "infringe" on unsurrendered Aboriginal rights.[20] For the Crown, the first step is to show "justification." In *Sparrow*, the court assumed everybody would agree that conservation of salmon stocks was a substantial and compelling public objective. The same assumption – that conservation laws are justified in limiting Aboriginal or treaty rights – guided the court's thinking in *Marshall.*

It's not that simple, though. By 1997 and the *Delagmuukw* decision, the Supreme Court said that logging, mining, hydroelectric development, and providing land to settle foreigners were justifiable objectives. Just about anything would justify unilaterally taking away Aboriginal or treaty rights. In 2014, with the *Tsilhqot'in* decision, the Supreme Court seemed to retreat: to be compelling and substantial, the public objective also had to further the constitutional goal of reconciliation.

The result of the *Marshall* decisions was an Indigenous commercial fishery, subject to federal regulations. Except that fishery didn't exist yet. Indigenous fishers had been excluded from the commercial fishery. The fishery is capital-intensive. Most of the fishing areas have been allocated to the existing industry. Indigenous people and communities are among the poorest, economically, in the country. It took the federal government two years to develop an "Atlantic Aboriginal Fisheries Strategy." Its philosophy is still intact: Canada provides money to Indigenous communities. They then shop around and seek to buy the licenses of existing commercial fishers. The licensees "sell"

To Indigenous peoples, this unique revisiting of the decision by the Supreme Court is another message about the political power of non-Indigenous commercial fishermen.

[19] See the *Ahousaht* decision: 2021 BCCA 155, which also mentions the limited authority of federal fisheries negotiators.

[20] The word has nothing to do with fringes. In the French version of the *Sparrow* judgment, the Supreme Court used "violation" to describe what was being done to the rights.

their licenses, and sell their boats and gear with them. Thus, Indigenous "access" to the fishery is provided through what Canada's Department of Fisheries and Oceans calls "voluntary relinquishment" by non-Indigenous commercial industry.

From our perspective, the strategy puts the commercial industry first – while the law requires the treaty fishery to take priority (again, see the 2021 *Ahousaht* decision). The strategy often involves Indigenous communities having to acquire the only available licenses – sometimes far from their traditional or preferred fishing areas. Those licenses are sold only with the license "owner's" boats and fishing gear, which are often near the end of their viable life (or they wouldn't be up for sale, would they?). The limited, basically captive market means high prices. The limited areas and equipment available can force an Indigenous community into a type of fishery it would not have chosen.

For several Indigenous communities, this strategy has nevertheless worked well. For others, the result has simply been creating a revenue stream by acquiring licenses and then subcontracting non-Indigenous fishers to conduct the fishery, sell the harvest, and pay the community a portion of the profits. We think the intent of the treaties is that we do the fishing ourselves, and that our entire community should benefit.

Though the Supreme Court of Canada said clearly that the treaties in question included the Passamaquoddy, the Department of Fisheries and Oceans excluded the Peskotomuhkati from participation in its "strategy," on the grounds that they were not "status Indians." Only after the Government of Canada began to negotiate what it called a "comprehensive claim plus" with the Peskotomuhkati in 2017 did the DFO start to recognize Peskotomuhkati treaty and Aboriginal rights.

Funding was provided on the basis of population figures that were estimates by the Departmenrt of Indian Affairs of the Canadian resident Peskotomuhkati population – about 400 people. A "Food-Social-Ceremonial" license for some lobster was offered, but on condition that the licensee be a corporation, because the DFO would not recognize the Council at Skutik as a legal entity. That is still the DFO position: that the Peskotomuhkati Nation, a treaty partner of the Crown, lacks the legal personality to secure a fishery license.

The 2017 "Rights Reconciliation" mandate

Soon after Peskotomuhkati negotiations with Canada began, we were told that we were going to sign a "rights reconciliation agreement." We were told that these were the result of a "made in Nova Scotia process" between DFO and the Mi'kmaq, and that the communities with rights recognized in the *Marshall* decision were going to sign these agreements. However, because the "mandate" was a cabinet document, we could be told very little about its content. Essentially, we were told that we had to agree, for a period of at least ten years, to fish only in accordance with the terms of the agreement, and also that we would not contest any fishing rights issues in court. We understood that the federal government, during that ten year period, would not discuss the terms of the treaties, but would insist instead that the rights reconciliation agreements delivered all that we could ask of the treaties. We were also told that significant funding – for example, for developing fishery governance structures – would be made available only if we signed an RRA.

From our perspective, the situation was dark. We were being subjected to a policy that we had not been consulted about in any way. We could learn about the limits of that policy only by asking to do

things that it prohibited or didn't cover – that's when we would be told we couldn't do this or that because of the RRA policy. When we asked for reasons, we were told it was cabinet confidential. Furthermore, at the same time as we were signing a Negotiation Framework Agreement with two federal ministers, an agreement that provided explicitly for the clarification and fulfillment of the spirit and intent of the treaty relationship, we were being told that if we wanted any meaningful DFO funding (other than to buy commercial boats and gear), we had to sign an agreement that would prevent that clarification. No, we have not signed a "rights reconciliation agreement." Neither have 31 of the 35 "eligible" communities. In 2021, the House of Commons Standing Committee on Fisheries and Oceans described the "rights reconciliation agreement" policy as a failure.

What is the difference between what we want to do and what DFO's "mandate" permits? We held two events that would have opened doors to progress on these issues – if the federal government was willing. The willingness was not there. We held a "Treaties Day" on which we intended to have a fulsome conversation with federal officials about the content and intent of the treaties. The federal negotiating team was allowed to attend, but was instructed not to speak. No DFO official was available to speak about the treaties. We were deeply disappointed. We held an "Oceans Day" event, an effort to work jointly with DFO. The department brought people who could talk about existing programs. We published a policy paper explaining our goals and priorities.

Those priorities are easy to understand. They're logical. They're based in Peskotomuhkati principles and laws, and on the treaty relationship. We have learned from watching the implementation and results of the "Aboriginal Fishery Strategy" as spectators and outsiders. We know what is available – and what ought to be. Our priorities are as follows:

1. Restoring the health of the ecosystem.
2. Restoring the health of the people
3. Joint stewardship and management of the marine ecosystem, including the fisheries
4. A genuine food fishery
5. A sustainable commercial fishery

What has been the federal government's response? To us, it has been a demonstration of the disconnection between the several federal departments we deal with, and of the Department of Fisheries and Oceans' enduring allegiance to the commercial fishing industry.

We have had some success in collaborating to *restore the health of the ecosystem.* The return of the alewives to the Skutik River; a joint river and shoreline restoration project with DFO; working together on the removal of the Milltown Dam, can only be called successes.

We have had no useful conversation with the federal government about *the health of the people.* We are told: "you're not status Indians, so the federal Department of Indigenous Services and Department of Health have no responsibility to you." The Department of Fisheries and Oceans maintains that human health is not part of its mandate.

Our efforts to engage in a conversation about *joint stewardship and management* have hit a brick wall. Though the Fisheries Act was recently amended to authorize the Minister to make agreements with "Indigenous governing bodies" about a wide range of subjects, we are told that the DFO has no

intention of using Section 4 "for the foreseeable future." We can't even get DFO to admit that the government of the Peskotomuhkati is an "Indigenous governing body."[21]

When we say we need a "*genuine food fishery,"* we mean several things. We want to avoid the obvious abuses that exist in some other places, where the fish earmarked for food for the people are sold for profit. We want to feed the people in all three of our communities. We want the food fishery, as well as the eventual commercial one, to be community based and owned, rather than controlled by individual "entrepreneurs." But an adequate food fishery costs money – to buy the boats and gear, to pay the expenses of operating the fishery, and to pay the salaries of the crew. DFO will make funding available only if we can produce a "business plan" for a profitable commercial fishery. There's nothing in the "mandate" for establishing or funding a viable food fishery.

DFO's strategy was to prioritize "access" for Indigenous communities to the *commercial fishing* industry. It was a strategy conceived in haste, and in partnership with the existing industry. There was little consideration of subsidizing Indigenous access to processing, distribution or marketing, nor to services to the industry. We set the commercial fishery last, not because we want to preserve our people's poverty, but because we can see that the existing industry is fishing many areas to capacity; that its operations are sometimes in direct conflict with environmental protection. We want to design our commercial fishery from the waters up, while fulfilling our other priorities.

Rather than engage in a serious conversation with us about our priorities – which DFO staff agree with and respect – we have been told at the negotiating table that "there is no appetite" to discuss these issues, or the treaties, and that we ought to stop insisting on long-term talks and instead become opportunists, taking advantage of federal programs as they become available. After all, there's good money to be had, if we play our cards right. We should stop being so ambitious and principled, and instead take "baby steps."[22]

2021 "consultation" and the 2022 extension

The 2017 mandate was to expire on April 4, 2022. In July, 2021 we received a letter from the Minister of Fisheries. It was the first and last we received from her (when we wrote to her before or since, she got civil servants to reply). It accompanied a five-page questionnaire. We were told to complete and return it within a month. It was part of a process aimed at "renewing" the existing policy, though it was unclear – and remains unclear – what was under review. We replied quickly. The questionnaire was prepared by people who had obviously never had any contact with us and were unaware of the state of our fisheries or negotiations. The next step was to be a document prepared by DFO called "what we have heard." We did not get that document until early December. One of our staff called it a "we were not listening" document. We did not bother commenting on it. Instead, we asked DFO representatives at our January, 2022 negotiation session how the DFO intended to proceed with consultation and accommodation before the expiry of the mandate. We were told that the consultations would take place, but that there was a "short runway." In fact, there were no consultations at all. We were formally told on April 5 that the mandate had been extended

[21] Yet when the DFO set out to "consult" about the proposed new Aquaculture Act, the only thing it suggested about "Aboriginal concerns" was the use of Section 4 agreements.

[22] The mantra from federal officials at the negotiating table tends to be "we can understand your frustration." That's what the clerk at the return desk at Best Buy says when we return a piece of non-functioning junk and ask to see the manager.

for a year the day before. We were then told that "there are going to be some consultations," but the federal fisheries representative could not say when, or what about, or to what purpose.

From our perspective, we've just lost a crucial year. DFO has fumbled, and continues to do so.

Rick Desautel and the rights of a single Peskotomuhkati Nation

The Supreme Court of Canada decided the *Desautel* case more than a year ago. We intervened in that case, because the situation of the Sinixt people whose rights were at issue is so close to our own. Both peoples were forced out of Canada, and then whoever was left on the Canadian side was said to be "extinct." But while the Sinixt have Aboriginal rights, we also have treaties with the Crown, made at a time when there was only British asserted claim to the land. The court decided that an Indigenous people with Aboriginal territory in Canada is an "Aboriginal people of Canada" for the purposes of protecting their rights in the Constitution of Canada. Obviously, it means that the two Peskotomuhkati communities in Maine have the same Aboriginal and treaty rights as the people who live in New Brunswick. We've been saying that for years. Now the decision is law in Canada.

Who is Peskotomuhkati? We have said that the people consist of the individuals registered on the tribal census of the Passamaquoddy Tribe, plus their children, plus several families who have always lived in Canada and never got to be registered anywhere. We have work to do to complete the process of identifying some of the people. Total numbers? Around 6,000 people.

A year after the Supreme Court decision, DFO tells us that it is "in the early stages of exploring" the mechanisms to implement *Desautel* in respect of "claims" (not rights) of the "non-resident" people. It says there is "no defined timeline" to accomplish this.

We want to maintain our priorities. The DFO's inaction and attitudes have an effect opposite to what the Department says it wants. Rather than support our efforts and our government, DFO is encouraging opportunistic Peskotomuhkati individuals to test our treaty rights by taking lobster quickly and without licenses or limits, while claiming to be championing our rights in court.

The Government of Canada needs to respect and implement the Desautel decision. Now.

Priorities

One lesson we learned in dealing with Canada about fisheries during the past fifteen years has been that, while Canadian law requires respect for, and implementation of, Aboriginal and treaty rights as the first priority after conservation, the DFO, as a matter of practice, consistently prioritizes existing commercial fishing interests. It doesn't matter whether this is the result of allegiance to the industry, or fear of an ugly backlash, or an inability to deal with the "novelty" of Aboriginal and treaty rights, forty years after their protection in the constitution. The effect is the same.

Clams: A commercial clam dig essentially wipes out a beach's productivity for the next eight to ten years. We asked DFO in 2007 to close the Bar Road and Indian Point beaches near St. Andrews to commercial digging. We proposed that these traditional beaches be reserved for our food needs, and those of the neighbours. When DFO refused to deal with us at all, the Council declared the beaches closed. The DFO called the RCMP on us. Once it became clear that we have an enforceable treaty and Aboriginal right, DFO delayed any action for several years, and eventually began to consult the

local industry. That took another two years – to set aside beaches that represent 0.2% of the local resource. We applied for access to the DFO files under federal access to information laws. Two and a half years later, we have seen about 1,200 pages of a 7,500 page file. The industry got priority, and it got damaging access to the beaches while we waited for DFO to run its process.

Eels: The American Eel is endangered. Harvesting elvers, baby eels, is very lucrative. We asked for a moratorium on all eel fishing in our area. Rather than have a conversation with us about the moratorium, DFO went to the nine licensees in the Maritimes and asked them whether they would be willing to voluntarily relinquish a portion of their harvest to make room for access for Indigenous people. When the licensees wanted too much money, the DFO reduced their harvest by 14% - and announced that the reduced portion would be allocated to Indigenous communities as part of the commercial eel fishery. If our rights are a priority, the Department should have had the conversation with us first. We didn't want a share of the take: we want to see the eels protected.

Indigenous Fisheries?

This has been a litany of complaint. The Peskotomuhkati are a people who have always lived on and with the life of the waters. Exclusion from Canada's actions to recognize and implement treaty and Aboriginal rights has given us a perspective that should, we feel, cause the Crown to want to work with us, to set an example of how a treaty-based fishery can be sustainable, restorative, and viable. Instead, we have met obstacles. And yes, we want our fish back…