ITK Submission to the
Senate Committee on Fisheries and Oceans
Bill C-55: An Act to Amend the Oceans Act and
the Canada Petroleum Resources Act

Background

Inuit Tapiriit Kanatami is pleased to present this submission on Bill C-55, An Act to amend the Oceans Act and the Canada Petroleum Resources Act. This proposed legislation is of critical interest to Inuit because it introduces the prospect for the Minister of Fisheries, Oceans and the Coast Guard Canada to exercise statutory authority to unilaterally designate certain marine areas as protected, thereby enjoining Inuit use of those areas, as well as the prospect for both renewable and non-renewable resource development within those areas. Moreover, if implemented, Bill C-55 would serve to undermine both the intent and the letter of modern treaties between Inuit and the Crown by undermining constitutionally entrenched rights in making critical conservation and development decisions in Inuit Nunangat.

Inuit are one of the three Indigenous Peoples recognized in section 35 of the Constitution Act, 1982. Inuit Nunangat, the Inuit homeland, contains over half of Canada’s coastline and comprises over a third of Canada’s landmass. Our way of life derives from our sustainable use of marine resources. The Inuit relationship to the marine environment is a critical source of social, cultural, and economic sustainability and prosperity. For Inuit, the conversation is not one of ‘extraction of resources’ versus ‘conservation’, but rather of how best to continue to use all resources to ensure prosperity for current and future generations of Inuit.

The Arctic Ocean is currently undergoing a fundamental change. Climate change should alter the very nature of the way in which Inuit and all Canadians approach both resource development and marine conservation. In a changing climate, rigid approaches to preservation and conservation of biological diversity which focus on fixed geographic areas will yield suboptimal results, as habitats for a variety of species will be shifting. To address this challenge, Canada needs to build on decades of collaboration and co-management, to ensure that conservation initiatives can protect wildlife populations which Inuit will continue to depend upon for the foreseeable future.

At the same time, the reality of grappling with climate change requires innovative solutions to energy and resource development in Inuit Nunangat. This includes leaving open possibilities for non-renewable resource development, particularly where such development could provide local energy sources, which

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displace more carbon intense fuel mixes that themselves need to be shipped to Inuit Nunangat from other regions.

The solution to these seemingly contradictory goals rests in the same form of environmental and resource management practices that Inuit have relied upon for millennia: to delicately balance the need for conserving environmental resources in the context of sustainable use of those resources. The continued existence of Inuit and the rich state of biological diversity in Inuit Nunangat is proof that these management practices work.

In Inuit Nunangat, every decision regarding natural resources has profound impacts on conservation of biological diversity as well as on resource development. As a consequence, any initiatives which contemplate conservation measures should contemplate potential renewable and non-renewable resource development and vice versa.

_Bill C-55 should build on, and not derogate from, Canada’s relationship with Inuit_

Rather than effect a vision of cooperative federalism and rights recognition with Inuit and other interested partners, the federal government should build on the existing relationships it has built across Inuit Nunangat. These relationships are founded on mutual respect, partnership, recognition of shared responsibilities for the governance of natural resources, and the protection of the environment.

The current language being considered in the Act reads, at section 35.1(2):

_The Minister may, by order, designate a marine protected area in any area of the sea that is not designated as a marine protected area under paragraph 35(3)(a), in a manner that is not inconsistent with a land claims agreement that has been given effect and has been ratified or approved by an Act of Parliament and, in that order, the Minister_

(a) _shall list the classes of activities that are ongoing activities in the marine protected area;_

(b) _shall prohibit, in the marine protected area, any activity that is not part of a class of activities set out in paragraph (a) and that disturbs, damages, destroys or removes from that marine protected area any unique geological or archeological features or any living marine organism or any part of its habitat or is likely to do so;_

(c) _may prohibit, in the marine protected area, any activity that is part of a class of activities set out in paragraph (a) and that is governed by an Act of Parliament under which the Minister is responsible for the management, conservation or protection of fisheries resources; and_

(d) _may exempt from the prohibition in paragraph (b) or (c), subject to any conditions that the Minister considers appropriate, any activity referred to in those paragraphs in the marine protected area by a foreign national, an entity incorporated or formed by or under the laws of a country other than Canada, a foreign ship or a foreign state._
Section 35.1 currently allows the Minister to designate a new marine protected area anywhere in Inuit Nunangat. The manner of the designation must not be inconsistent with any constructive arrangements (modern treaties or self-government agreements) which are themselves implemented by an Act of Parliament. This text within section 35.1 is both vague and confusing. It provides limited to no reassurance to Inuit, particularly because Bill C-55 does not contain a non-derogation clause. This means that section 35.1 is likely intended to accomplish the same objective as a non-derogation clause, albeit with considerably more specificity.

It is unclear what the phrase “in a manner” is meant to convey. Such a phrase could indicate that the process of designation should occur ‘in a manner not inconsistent with’ modern treaties. This safeguard could be as limited as providing information to modern treaty partners that a designation is imminent and offering them an opportunity to comment. [cite low end of spectrum on duty to consult]

Alternatively, the phrase “in a manner” might indicate that the exercise of Ministerial authority under s.35.1 must occur ‘in a manner not inconsistent with’ modern treaties in substance. This could be as expansive as an assurance that no exercise of Ministerial authority under s. 35.1 may be contemplated by the Minister if it adversely impacts specific treaty obligations articulated under modern treaties or alternatively if such a designation would be contrary to the spirit and intent of those treaties. The latter interpretation is more likely accurate because the Minister already lacks the authority to take actions, even when delegated by statute, which contravene specific obligations contained in modern treaties.

This latter interpretation, that the authority exercised by the Minister must be exercised in a fashion consistent with the underlying spirit and intent of modern treaties, may be further supported by reference to the very Acts of Parliament referred to in s.35.1(2).²

Recommendation

The Senate should offer greater specificity on the legislative expectation for the Minister’s conduct. Bill C-55 should be amended to clarify that the Minister may not exercise authority under the Act in a unilateral fashion. An alternative way of phrasing this is to suggest that the Minister may only exercise authority under the Act within Inuit Nunangat only with the express consent of the relevant Inuit rights-holder. Such language would substantially clarify the Inuit understanding of the term ‘in a manner not inconsistent with’ by providing a clear standard and a clear expectation of how federal administrative delegates should exercise their discretion, when making decisions which impact on the lands, territories and resources of Inuit, and further, advancing the expectation of co-management across Inuit Nunangat. This expectation is consistent with the robust implementation of co-management regimes and the intent, if not the letter, of modern treaties.

Section 35.1(2) should be amended to read (deletion in strikethrough, addition in italics):

The Minister may, by order, designate a marine protected area in any area of the sea that is not designated as a marine protected area under paragraph 35(3)(a), in a manner that is not inconsistent with only with the consent of any relevant indigenous party to a land claims agreement that has been

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² Supra note 11.
given effect and has been ratified or approved by an Act of Parliament and, in that order, the Minister...

This proposed change offers clarity surrounding the interactions between the Minister and modern treaty rights-holders potentially impacted by a designation. This language also specifies that the standard applies to relevant rights-holders, rather than individual harvesters, institutions of public government or co-management bodies established through modern treaties. This language will reduce the uncertainty surrounding the phrase ‘not inconsistent with’ by providing language which provides a clear and unambiguous standard to guide the Minister’s exercise of discretionary authority. Spirit and Intent of the Treaties

As currently drafted, Bill C-55 does not create an opportunity for dialogue regarding governance of offshore resources. Rather, it expands the Minister’s authority over such matters by granting unilateral authority to enjoin development within designated areas. Such authority may be illusory and subject to legal challenge providing unacceptably broad discretion to the Minister over matters which are central to Inuit rights.3

More important, the Ministerial authority contemplated in the proposed legislation is inconsistent with the principles set down by the courts to encourage dialogue between rights-holders and the Crown. Applying these principles would emphasize the importance of respect for Inuit rights, dialogue and joint decision-making when making resource development or conservation decisions in Inuit Nunangat.

Inuit Nunangat is a region which is unique in Canada in that Inuit have each settled modern treaties. Modern treaties are more than a set of specific constitutional obligations, outlined within the terms of the agreements. They are also part of a broader relationship, in which Inuit have asserted and expressed self-determination in partnership with the Crown.4 As the Supreme Court of Canada has noted, “The argument that th…Treaty is a “complete code” is untenable...The treaty sets out rights and obligations of the parties, but the treaty is part of a special relationship”.5

This special relationship and the principle of reconciliation are important because the proposed legislation would undermine one of the key principles underlying the Inuit-Crown relationship: partnership in the shared stewardship of environmental resources.6

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3 R. v. Adams, [1996] 3 SCR 101, 1996 CanLII 169 (SCC), http://canlii.ca/t/1fr7b. At para. 54, the Court stated that, “Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance.”

4 First Nation of Nacho Nyak Dun v. Yukon, [2017] 2 SCR 576, 2017 SCC 58 (CanLII), online: http://canlii.ca/t/hp2d8. At para. 33, the Court stated, “Paying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text as a whole and the treaty’s objectives.”

5 Beckman at para. 62. The Court was unanimous on this point. See also ibid at para 113, “the fact that a treaty has been signed and that it is the entire agreement on some aspects of the relationship between an Aboriginal people and the non-Aboriginal population does not imply that it is a complete code that covers every aspect of that relationship.”

6 Nacho Nyak Dun at para. 33. There, the court recognized the intention of the Parties to establish a particular “co-operative governance”
The Crown is obligated to fully implement the specific obligations of each of the modern land claims agreements. The Crown is also obligated to negotiate in good faith with Inuit on matters which impact Inuit rights, but which are not expressly covered by the land claims agreements.7

The Honour of the Crown has resulted in the recognition of a duty to consult and accommodate Inuit, particularly when it contemplates decisions which might have an impact on marine resources. This duty extends beyond specific obligations contained within modern treaties to contemplated Crown conduct which might impact environmental resources related to protected rights.8 It is well established law that in some cases, a duty to consult may lead to a requirement to secure the consent of indigenous peoples prior to contemplated government action.9 Examples include where the contemplated conduct might include prohibitions on harvesting or development in Parks.10

While the settlement of rights to the offshore may not have been contemplated in the original land claims, the process for managing offshore resources, as well as reconciling Inuit sovereignty with Canada’s assertion of rights to manage those resources, should be governed by the same relationship as recognized and affirmed in those treaties. As the Court noted in Beckman, irrespective of the terms of a modern treaty, “[c]onsultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown.” [emphasis added]11

Protected Areas Policy often leads to violations of the rights of indigenous peoples

The development of protected areas can be as disruptive to Inuit rights as the development of large scale mining projects, large scale renewable energy projects or non-renewable resource development. The global experience has demonstrated that attempts to conserve the environment by unilaterally enjoining access or restricting development, even on a temporary basis while negotiations proceed, is inconsistent with the recognition of indigenous rights.12 This is why virtually every piece of federal

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7 Beckman v. Little Salmon/Carmacks First Nation, [2010] 3 SCR 103, 2010 SCC 53 (CanLII), http://canlii.ca/t/2df7v. At para 2, the court explained “...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.”
8 Clyde River (Hamlet) v. Petroleum Geo-Services Inc., [2017] 1 SCR 1069, 2017 SCC 40 (CanLII), online: http://canlii.ca/t/h51gy, at para. 43. In this case, the court held that that the duty to consult and accommodate had not been fulfilled because the nature of the supporting regulatory inquiry had not adequately considered the relationship between environmental impacts and the underlying treaty right to harvest marine mammals.
9 Haida Nation v. British Columbia (Minister of Forests), [2004] 3 SCR 511, 2004 SCC 73 (CanLII), online: http://canlii.ca/t/1j4tg, at para 24. At para. 48, the court noted that, “The Aboriginal “consent” spoken of in Delgamuukw is appropriate only in cases of established rights, and then by no means in every case.” Rights articulated in modern treaties are considered ‘established rights’. See Clyde River, supra note CR at para. 43.
11 Beckman, supra note BB at para. 73.
legislation enacting an Inuit modern treaty requires changes to federal conservation legislation.\textsuperscript{13} Both the Crown and Parliament have recognized for decades that Inuit rights, conservation and development are closely intertwined endeavors. It is unclear that the House of Commons gave adequate considerations to these interconnections in reviewing Bill C-55.

Inuit self-determination and the principle of co-management enshrined in land claims agreements across Inuit Nunangat means that the uses of environmental resources cannot be dictated by the federal Crown anymore than it can be dictated by provincial/territorial governments or Inuit. Hence, the unilateral power of the Minister outlined in Bill C-55 is inconsistent with both the Crown’s obligations under section 35 of the Constitution Act, 1982 as well as its cooperative relationship with respect to resource development with provinces and territories.

\textsuperscript{13} See, for example, Western Arctic (Inuvialuit) Claims Settlement Act, An Act to approve, give effect to and declare valid the Agreement between the Committee for Original Peoples’ Entitlement, representing the Inuvialuit of the Inuvialuit Settlement Region, and the Government of Canada and to amend the National Parks Act in consequence thereof, S.C. 1984, c. 24. The third preambular paragraph of that Act states, “AND WHEREAS the Agreement provides, among other things, for the grant to or the setting aside for the Inuvialuit of certain lands in the Inuvialuit Settlement Region, for the right of the Inuvialuit to hunt, fish, trap and carry on commercial activity within the Inuvialuit Settlement Region in accordance with the regimes established therein, for measures to preserve Inuvialuit cultural identity and values within a changing northern society, to enable the Inuvialuit to be equal and meaningful participants in the northern and national economy and society and to protect and preserve the Arctic wildlife, environment and biological productivity and for the payment to the Inuvialuit of certain compensation;” [emphasis added].