Peskotomuhkati Thoughts on Bill C-55, An Act to amend the Oceans Act and the Canada Petroleum Resources Act.

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For the Senate Standing Committee on Fisheries and Oceans Hearings Held February 5 and 6, 2019, as the Committee Considers Bill C-55, An Act to amend the Oceans Act and the Canada Petroleum Resources Act.

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Introduction
The Peskotomuhkati Nation at Skutik is engaged in comprehensive negotiations with the Government of Canada and the Government of New Brunswick. With respect to fisheries, one important basis of the negotiations is the series of treaties, running from 1725 to 1761, in which the Crown is committed to protecting Peskotomuhkati fishing rights: personal and community; food and commercial. The treaties are shared by all the Wabanaki nations in Canada: by the Peskotomuhkati, by the Mi’kmaq and Wolastokiyik (Maliseet). The negotiations aim to implement those rights in a contemporary, respectful context.

Before the negotiations began in 2016, though, things were very different. The Minister of Fisheries and Oceans would respond to letters from the Peskotomuhkati Council by stating that until the Department of Indian Affairs and the Department of Justice had completed the process of recognizing Peskotomuhkati rights, the Department of Fisheries and Oceans would not be in a position to deal with the Peskotomuhkati at all. Today, though the existence of trust funds is recognized, and claims concerning Peskotomuhkati Indian reserves being sold without consent have been accepted for negotiation by Canada, the federal government does not formally recognize, at time of writing, the Peskotomuhkati Nation at Skutik as a “band” pursuant to the Indian Act, nor its people as “Indians” pursuant to that statute.

The Peskotomuhkati Nation is in the anomalous position of having recognized treaty fishing rights, and active negotiations with the Department of Fisheries and Oceans, without many of the connections and funding sources that “bands” have. Matters are made far more complex as a result of the Government of Canada’s acknowledgment, on the one hand, that the treaties were made with the entire nation, while on the other hand, refusing to recognize the treaty fishing rights of Peskotomuhkati residents of the United States. Since many families were driven out of Canada as a result of prosecutions for fishing offences, and takeovers of land by Loyalists and other immigrants, the federal position adds to the cruelty of our shared history.

We therefore have four concerns about the amendments to the Fisheries Act.
1. There has been no consultation. Neither before nor after the introduction of the Bill to amend the statute did any officials consult with the Peskotomuhkati Nation about the proposed changes to the Act. Since the changes directly affect the implementation of treaty and Aboriginal rights protected by the Constitution of Canada, the Peskotomuhkati have a right, not only to be consulted, but also to be accommodated. The fact that we agree with many of the changes does not relieve the federal government of the constitutional obligation to consult and accommodate, an essential element of reconciliation. We recognize that the recent Mikisew Cree decision in the Supreme Court of Canada confirms that Parliament is supreme, and that the passage of a law without effective consultation is within Parliament’s power. But we would not want to see Parliament become the path the federal government will choose every time its duty to consult is seen as inconvenient or onerous. It is a valid concern because, with respect to the Fisheries Act and Peskotomuhkati treaty rights, the Government of Canada has done this before.

2. We welcome the restoration of the habitat protection provisions of the Fisheries Act. In our view, these have historically been the most effective environmental protection provisions in Canadian law. They were repealed in a previous amendment to the Act. We have asked that they be restored, and we support their restoration. However, the repeal, and our experience with the provisions that replaced them, taught us two important lessons. The first is drawn from the fact that the repeal came through an omnibus budget bill, without consultation: Parliament may be used to circumvent the duty to consult. The second is our experience with the replacement provisions. They purported to protect “Aboriginal fisheries.” However, the staff of the Department of Fisheries and Oceans was steeply reduced and, as a result, no effort was made to identify Aboriginal fisheries. Without that knowledge, there was little likelihood of any real protection. Without provision for implementation, even the most positive and respectful protective laws will be hollow. That is one reason we are expressing our concerns about how traditional knowledge will actually be used.
3. We welcome the provision that the Minister may take into account, in making decisions, traditional Indigenous knowledge that has been provided to the Minister. Having learned the lessons of the previous law about filling in blanks of knowledge, we want to know:

A. Who is to gather the traditional Indigenous knowledge?
B. Who authenticates the traditional Indigenous knowledge?
C. Who owns the traditional Indigenous knowledge?
D. Who protects the traditional Indigenous knowledge, if it is confidential or sensitive?
E. Who chooses what traditional Indigenous knowledge is provided to the Minister?
F. Who gets to provide the traditional Indigenous knowledge to the Minister?
G. How do we know whether and how the traditional Indigenous knowledge has been taken into account?

Traditional knowledge is sensitive. It is also, in many ways, endangered. While we have no difficulty with the intent of this provision of the law, we are concerned that, as with the Aboriginal fishery protections in the previous law, it may be lost if no resources are put toward gathering, identifying, protecting, teaching and using traditional knowledge. And, in the opposite direction, improper dissemination of that knowledge can be equally destructive.

4. We welcome – conditionally – the provisions that permit the Minister to make fishery agreements with “Indigenous governing bodies.” Though we have recognized treaty fishing rights, at this point, we currently have a profound disagreement with the Department of Fisheries and Oceans concerning both food and commercial fisheries. The Department maintains that the only path to recognizing (“legalizing”) our food fishery lies through licensing. We maintain that, pursuant to the Supreme Court of Canada’s Sparrow decision in 1990, our right to fish for food is not to be curtailed in any way unless the steps described in that case are met by Canada. We have been clear that we have no objection to making collaborative agreements with the Department of Fisheries and Oceans, though. If our Council is included in the vaguely defined term of “Indigenous governing body,” we will have acquired a useful process. If we are not included, the failure to define the term broadly enough will lead to possible confrontation and litigation. We are also concerned that a failure to include enough flexibility to clarify that our people resident in Maine also have treaty fishing rights, which we can implement through agreements with Canada, will fall short of our needs, and of equity.
In Summary:

1. The proposed amendments to the Act are welcome and should not be allowed to fail.

2. We do not want to see the use of Parliament as a means to avoid required consultation, to become an accepted federal norm.

3. We want to work with you to address the concerns we have identified around traditional Indigenous knowledge.

4. We want confirmation that our government is an “Indigenous governing body.”

Woliwon, Merci, Thank you,

Kayanesenh (Paul Williams)
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Kayanesenh Paul Williams

Mr. William’s 1982 LLM thesis, The Chain, covered Crown relations with the Haudenosaunee and Anishinaabeg from 1645 to 1924; his work for the Canadian Royal Commission on Aboriginal Peoples deepened that research. His historical survey of Crown-Peskotomuhkati relations and land rights was completed in 2007. He is the lead negotiator for the Peskotomuhkati Nation.

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