FEDERAL COURT

BETWEEN:

HUGH AKAGI, WILLIAM NICHOLAS and
AMKUWIPOSOHEHS BASSETT
On behalf of the Peskotomuhkati Nation

Applicants

-and

HIS MAJESTY THE KING IN RIGHT OF CANADA

Respondent

NOTICE OF APPLICATION
(JUDICIAL REVIEW)

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicants. The relief claimed by the applicants appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

DATE: August 12, 2024

Issued by: _____

(Registry Officer)

Address of Local Office: 180 Queen Street West, Suite 200
Toronto, Ontario M5V 3L6

TO: **THE ADMINISTRATOR**
Federal Court

AND TO: **THE ATTORNEY GENERAL OF CANADA**
Ontario Regional Office
Department of Justice Canada
120 Adelaide Street West
Suite 400
Toronto, Ontario M5H 1T1

APPLICATION

This is an application for judicial review of a decision by the Minister of Fisheries and Oceans and the Canadian Coast Guard of Canada or her Department ("DFO") to divide the area of the Atlantic Ocean known administratively as Lobster Fishing Area 37 ("LFA 37") between two groups of non-Indigenous fishermen's associations, for the purpose of fishing lobster. The decision was originally made in October, 2022. It was reissued and modified on October 11, 2024.

THE APPLICANTS MAKE APPLICATION FOR:

1. An Order setting aside the decision of the Minister of Fisheries and Oceans dated October 11, 2024, with respect t the allocation of lobster fishing in Lobster Fishing Area 37;

2. An Order that the decision of the DFO to divide LFA 37 between the Grand Manan Fishermen's Association and the Fundy North Fishermen's Association be set aside;

3. An Ordeer that the DFO cnduct a careful assessment of the state of, and trends in, the lobster populations of LFA's 36, 37 and 38;

4. An Order that the Crown engage in a meaningful process of consultation and accommodation with the Peskotomuhkati Nation with respect to its proposal that LFA 37 be set aside as a marine protected area with a sustainable Peskotomuhkati food and commercial fishery;

5. An Order that the Court shall remain involved in ensuring the effectiveness of the process in the same manner and spirit as the Court's processes of mediation and case management;

6. An Order that the Crown pay the Applicants' costs of this Application on a solicitor and his client, full indemnity basis;

7. Such further and other remedies as to this Honourable Court may seem equitable and just.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. Affidavit of Hugh Michael Akagi, to be sworn;
2. Letters and e-mails from DFO setting out the decision to divide LFA 37 between the Grand Manan and Fundy North Fishermen's Associations;
3. Such further and other material as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

1. The grounds for the application are that the decision was made without proper regard for the state of the lobster populations; without having accommodated Peskotomuhkati Aboriginal and treaty rights; without having fulfilled the Crown's procedural treaty obligations; without having respected Peskotomuhkati priority of allocation in the fishery; and without fulfilling the Crown's constitutional obligation to engage in a process of consultation and accommodation. DFO has failed to respect the terms of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, either in fulfilling the terms of the treaty relationship, or in respecting Peskotomuhkati rights with respect to the fisheries of traditional Peskotomuhkati waters. DFO has failed to respect the decision of the Supreme Court of Canada in *R. v. Desautel,* by refusing to acknowledge or consider the rights of the Peskotomuhkati communities of Sipayik and Motahkamikuk. The application is a request to the Federal Court of Canada to set aside the DFO decision so that Peskotomuhkati treaty fishing rights and priority of allocation of fisheries may be fulfilled and accommodated.

The Peskotomuhkati: Aboriginal and treaty rights

2. The Peskotomuhkati (Passamaquoddy) are the Indigenous people of the watershed of the Skutik (St. Croix) River and adjacent waters and islands in Passamaquoddy Bay, the Bay of Fundy and the Atlantic Ocean. The archaeological record of their presence in their lands and waters covers 14,000 years. The lands and waters of Peskotomuhkati territory are called *Peskotomuhkatikuk.*

3. The Peskotomuhkati entered into a treaty relationship with the Crown in 1725. The relationship, in Peskotomuhkati law, is called *likutawakon*, or "making family." That relationship was reaffirmed and adjusted over the decades that followed. The Peskotomuhkati treaty relationship with the Crown was last formally reaffirmed by the Deputy Superintendent General and Deputy Minister of Indian Affairs on behalf of the Government of Canada (hereinafter "Canada") in 2016.

4. The written text of the 1725 treaty document provides that the Peskotomuhkati would not be molested by the Crown or its subjects in "the hunting and fishing," while the Peskotomuhkati would not interfere with the Crown's subjects in their "settlements lawfully established." The Peskotomuhkati continued their traditional way of life, an annual seasonal round, in which they used all their traditional lands and waters with a light ecological footprint.

5. In 1760 and 1761, the Peskotomuhkati and the other three Wabanaki nations and the Crown adjusted the relationship to provide for a Wabanaki treaty right to fish commercially. It was part of an adjustment for regulation of trade after the Crown's conquest of New France. That right was recognized by the Supreme Court of Canada in 1999 in the matter of *R. v. Donald Marshall Jr.* (1999 CanLII SCC 665, 1999 CanLII SCC 666). The provisions of the treaty documents with the four Wabanaki nations are very similar. The Peskotomuhkati were the first to negotiate the treaty terms.

6. The Peskotomuhkati and the Crown amended their treaty relationship in 1766, at the instigation of the imperial Superintendent General of Indian Affairs, Sir William Johnson, by extending to the Peskotomuhkati and the other three Wabanaki nations of the Covenant Chain relationship. That relationship places a mutual obligation on the parties to resolve matters of concern (*R. v. Montour,* 2023 QCCS 4154).

7. The Peskotomuhkati have never surrendered to the Crown any of their Aboriginal title or rights. In October 2019, the Peskotomuhkati Nation at Skutik and the Governments of Canada and New Brunswick signed a Negotiation Framework Agreement that confirms their intention to clarify Aboriginal rights and title, and to conduct their negotiations in the context of the treaty relationship. Negotiations with Canada are continuing.

8. *R v. Desautel* (2021 SCC 17) was decided by the Supreme Court of Canada in April 2021. The Peskotomuhkati intervened in the appeal of that case, to protect their rights as a single united nation with treaty as well as Aboriginal rights and title. The court decided that an Indigenous people with traditional lands in Canada are “an Aboriginal people of Canada” for the purposes of addressing their Aboriginal rights as recognized and affirmed in section 35(1) of the *Constitution Act, 1982* of Canada.

9. The Peskotomuhkati, as an Indigenous nation and people, consist today of three closely interrelated communities. Peskotomuhkati treaties with the Crown were made by that single nation, at a time when the United States of America did not exist, and all of traditional Peskotomuhkati territory was within the boundaries of British colonies. The three communities are Sipayik (Pleasant Point) and Motahkamikuk (Peter Dana Point) in Maine, and Skutik, in New Brunswick.

10. The Applicants are the Sakoms or Chiefs of the three Peskotomuhkati communities, and they bring this application in their representative capacity on behalf of their Councils and the Peskotomuhkati Nation.

11. As a matter of practice and mutual agreement within the Nation, Sipayik and Motahkamikuk take the lead for the Nation in matters dealing with the United States of America and the State of Maine, while Skutik takes the lead in matters dealing with Canada and the Province of New Brunswick.

12. In the nineteenth century, many Peskotomuhkati decided to live in the United States part of their territory after British Crown subjects took over many traditional Peskotomuhkati hunting, fishing and living areas, and provincial authorities prosecuted Peskotomuhkati hunters and fishers. However, most Peskotomuhkati continued to use all of their traditional lands and waters, whether in Canada or the United States, in their traditional ways.

13. The Peskotomuhkati have insisted that the Aboriginal and treaty rights that are the subject of negotiations with Canada are rights of the entire nation. Representatives of the two Maine communities are members of the Peskotomuhkati negotiating team at the “main table” negotiations.

The *United Nations Declaration on the Rights of Indigenous Peoples*

14. The *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* is a positive statement of Canada’s obligation to fulfill the terms of its treaties with Indigenous peoples and to recognize their rights to their lands and resources.

15. Canada’s Parliament in 2021 passed the *United Nations Declaration on the Rights of Indigenous Peoples Act* (SC 2021 c. 14). Through that law, the Declaration became an integral aspect of the laws of Canada. The Act declared that “the Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.” The Act and Declaration are the lens through which Canadian statutes must be viewed where they address the rights of Indigenous peoples.

16. Article 37 of the UN Declaration states that “Indigenous peoples have the right to the recognition, observance, and enforcement of treaties, agreements, and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.”

17. Article 32 of the UN Declaration states that “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”

18. Article 29 of the UN Declaration states that “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”

The *Desautel* decision

19. In *R. v. Desautel* (2021 SCC 17), a decision rendered April 23, 2021, the Supreme Court of Canada stated: “the scope of ‘aboriginal peoples of Canada’ is clear: it must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contacts. As a result, groups whose members are neither citizens nor residents of Canada can be Aboriginal peoples of Canada.”

20. Canada has done nothing to implement the *Desautel* decision since it was issued. The Peskotomuhkati have repeatedly requested direct negotiations to implement the decision. Canada’s lead negotiator insists he has no authority to discuss it.

21. In the “Action Plan” required by Parliament to implement the UN Declaration, Canada proposes to “respond” to the Supreme Court’s decision in *Desautel* by engaging in “exploratory discussions about the impact of colonialism” with peoples with rights described in the decision. In January, 2024, the Peskotomuhkati requested those exploratory discussions. There has been no reply to their letter.

22. The Peskotomuhkati, as one Indigenous nation, have both treaty and Aboriginal rights to fish, and hold Aboriginal title to the lands and waters of Peskotomuhkatikuk.

Constitutional obligations: consultation and accommodation

23. Since the 2004 Supreme Court of Canada decision in *Haida Nation v. British Columbia (Minister of Forests)* (2004 SCC 73) it is clear that when the Crown contemplates an action that could adversely affect treaty or Aboriginal rights, it must consult with the Aboriginal people whose rights could be affected. Where the rights are merely "asserted," consultation may be at the light end of a spectrum. Where the rights are "established," the Indigenous people must not only be consulted: their rights must be "accommodated."

24. The obligation to consult and accommodate arises from the honour of the Crown, which is implicated in all the Crown's dealings with Indigenous peoples. It is an element of the constitutionally mandated goal of reconciliation. In a legal context, "reconciliation" means reconciling the Crown's unilateral assertion of sovereignty with the continued existence of Indigenous peoples, their rights, governments and laws. The creation of treaty relationships is an aspect of implementing that reconciliation *(Haida Nation v. British Columbia, supra.).*

25. The Supreme Court of Canada, in *Mikisew Cree First Nation v. Canada (Minister of Heritage)* (2005 SCC 69), explained that the Crown, as a party to the treaties, is presumed to be aware of their terms. Treaty rights are "established," not "asserted." They require accommodation, not mere consultation.

26. There are substantive treaty rights, like the right to fish, and procedural treaty rights *(Mikisew Cree, supra.)*. The mutual obligation to meet and work together to resolve concerns is an aspect of the Covenant Chain relationship (*R. v. Montour, supra.*).

Wolastoqey fisheries

27. The Wolastoqey or Maliseet Nation is the Indigenous people of the watershed of the St. John River. The Wolastoqey, together with the Peskotomuhkati, the Mi'kmaq and the Penobscot, are a member of the Wabanaki Confederacy. Like the Peskotomuhkati and the Mi'kmaq, they are party to the beginning of the treaty relationship in 1725; the adjustment in 1760 that has been held to support treaty commercial fisheries; and the extension of the Covenant Chain relationship in 1766. The Wolastoqey and the Peskotomuhkati are politically distinct nations, but share a common language.

28. Since 1990, DFO has issued lobster fishing licenses to several Wolastoqey communities in traditional Peskotomuhkati waters. Many of these licenses are "communal commercial licenses," which are actually fished by non-Indigenous fishers under contract. DFO also issued food, social and ceremonial (FSC) licenses to these communities.

29. Though the traditional lands and waters of the Wolastoqey are in the watershed of the Wolastok and do not extend into Peskotomuhkati territory, the Wolastoqey have used the licensing by DFO to support their assertion of their exclusive Aboriginal title to all of traditional Peskotomuhkati lands and waters in Canada, including in court.

30. One result of the issuance of communal commercial lobster fishing licenses to the Wolastoqey communities has been that the majority of "Aboriginal consultation" about LFA 37 has been concentrated on the Wolastoqey, who are being treated as "rights holders," and far less time has been spent on the Peskotomuhkati. When consultant Michael Cherry was contracted by DFO to recommend a location for the dividing line across LFA 37, the majority of his meetings and time concerning Indigenous peoples was spent with the Wolastokiyik, and far less time with the Peskotomuhkati.

Priority of allocation

31. In *R. v. Sparrow*, in 1990, the Supreme Court of Canada set out a hierarchy of rights of access to fisheries. Conservation comes first. Where there are concerns about the conservation of a marine population, Indigenous food fisheries are the last to be curtailed, and the first to be permitted access to the fishery when the populations permit harvesting. The case law that has developed since *Sparrow* indicates that Indigenous treaty fisheries, including commercial fisheries, are the next priority, and that non-Indigenous fishers' access to the fisheries (whether for food, recreation or commerce) have a lower priority of allocation than Indigenous food fisheries and Indigenous treaty commercial fisheries.

32. In *R. v. Gladstone* (1996 CanLII 160 (SCC)), the Supreme Court of Canada, addressing Aboriginal commercial fishing rights, stated that "the doctrine of priority requires that the government demonstrate that it has taken the existence of aboriginal rights into account in allocating the resource and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource, and the actual allocation of the resource which results from that process, reflect the prior interest of aboriginal rights holders in the fishery."

33. The express policy of the Peskotomuhkati Nation at Skutik, *Samaqan,* issued in 2019, explains that the conservation and protection of the Peskotomuhkati ecosystem is the highest priority. After that, the next priority is providing food for the Peskotomuhkati people. The next after that is the treaty commercial fishery, which must be sustainable. After that, if there are fish available, come non-Peskotomuhkati recreational and commercial fisheries. These priorities are consistent with those expressed by the Supreme Court of Canada with respect to Indigenous fisheries.

34. The Peskotomuhkati consider that an Aboriginal and treaty right to fish must include a right that there shall be fish. The eradication of most fish populations in traditional Peskotomuh-kati waters has meant that the only remaining fisheries with any commercial viability are bottom dwellers: lobster and scallop. The obligation to protect and restore the marine ecosystem has led the Peskotomuhkati, in negotiations with DFO, to demand meaningful joint management of the ecosystem. DFO's response has been to propose that the Peskotomuhkati take part in advisory committees, with all final decisions resting with DFO.

35. "The stage of justification" described in the *Gladstone* decision is the first step the Crown must take if it intends to infringe upon an Aboriginal or treaty right, according to the *Sparrow* decision. The Crown must demonstrate that the abridgement of the rights serves a justifiable public objective. Failing to accord the Peskotomuhkati commercial fishery priority of allocation, or indeed any allocation, is an abridgement of the Peskotomuhkati treaty right. Rather than (as required by *Gladstone*) demonstrating how the process of allocation and the actual allocation of the lobster resource in LFA 37 reflects the Peskotomuhkati treaty priority of allocation, DFO has made no allocation at all for the Peskotomuhkati treaty commercial fishery. The infringement upon the treaty right has not passed the stage of justification.

36. In the Supreme Court of Canada's decision in *Tsilhqot'in v. British Columbia,* 2014 SCC 44, the court explained that any justification of an infringement by the Crown of an Aboriginal right must be shown to be compatible with reconciliation. "Reconciliation," as expressed in the *Haida Nation* decision, includes the making – and fulfillment – of treaties. To fulfill its treaty promises to the Peskotomuhkati concerning commercial fisheries, the Crown must implement the treaty rights in a manner that recognizes the priority of the Peskotomuhkati fishery over the exploitation of the lobster fishery by others.

Lobster Fishing Area 37

37. DFO has divided the waters off the Peskotomuhkati mainland – the traditional waters of the Peskotomuhkati Nation, for fishing purposes – into three "Lobster Fishing Areas." LFA 36, in the west, is fished by the Grand Manan Fishermen's Association. LFA 38, in the east, is fished by the North Fundy Fishermen's Association. These associations are groups of non-Indigenous fishermen. The Grand Manan and North Fundy fishers were allowed by DFO to fish in LFA 37, but they came into conflict.

38. As a result, DFO proposed, in the late spring of 2022, to divide LFA 37 geographically between the two associations, to prevent conflict between them.

The 2023 Decision to divide LFA 37

39. On October 30, 2023, Angela Vance, the Acting Director of the Southwest New Brunswick District of DFO, sent Peskotomuhkati Sakom Hugh Akagi an e-mail informing him of an "RDG decision."

> For the 2023-2024 season, Lobster Fishing Area (LFA) 37 will again be reallocated to LFAs 36 and 38 to provide commercial license holders with defined and equitable access to these fishing grounds.
> This measure means that commercial license holders in LFAs 36 and 38 are assigned separate sections of LFA 37, depending on the LFA to which their license gives them access. Similar to last year, the interim measure only applies to commercial licenses, but not communal commercial licenses.
> Fisheries and Oceans Canada (DFO) will continue to work with First Nations and industry stakeholders and to monitor the impacts of the interim reallocation coming to a final decision on the permanent reallocation of LFA 37 to LFAs 36 and 38.

40. On October 11, 2024, Noel d'Entremont, the DFO Area Director for Southwest New Brunswick, wrote to Sakom Hugh Akagi, informing him of "the Minister of Fisheries and Oceans' October 11, 2024 decision to apply the 2022-23 boundary to both commercial and communal commercial, CC licences for the 2024-25 season on an interim basis."

41. DFO communication has not indicated the reasons for the decision, or the extent or manner in which Peskotomuhkati rights or proposals were taken into account.

42. There has been no DFO contact about the proposed decision with the governments of the Peskotomuhkati communities of Sipayik or Motahkamikuk. In meetings with the Regional Director General and DFO enforcement staff, the Skutik Council was informed that lobster fishers from those communities who fished in Canada without DFO licenses would see their traps seized and they would be charged with illegal fishing. No DFO licenses were available for those lobster fishers. At least one Peskotomuhkati lobster fisherman from Sipayik is now facing charges in New Brunswick provincial court for illegally entering Canadian fisheries waters.

43. A May 8, 2024 letter to Sakom Hugh Akagi purported to seek "consultation with Peskotomuhkati nation at Skutik, Peskotomuhkati, regarding a contemplated change to communal commercial licenses that would divide access to Lobster Fishing Area 37 (LFA 37) between those authorized to fish in either LFA 36 or LFA 38…and would specifically like to consult at this time on dividing LFA 37 for all commercial harvesters for the 2024-2025 fishing seasons, which would include communal commercial licenses." The letter explains that the "intention of the division [in 2022] was to avoid overlap of commercial LFA 36 and 38 harvesters throughout LFA 37, thus reducing the race for "first access" between industry groups…Commercial harvesters that were impacted by the change still feel a need to "race for first access" against harvesters authorized under a communal commercial licences that have retained full access to LFA 37. In 2023, these concerns, coupled with LFA 38 opening prior to LFA 36 due to weather, resulted in a substantial increase in disorderly conduct at the beginning of the season." Nothing in the letter indicates that Peskotomukati treaty rights, including priority of allocation or the rights of the two larger communities, were being taken into account.

“Communal commercial licenses”

44. The Peskotomuhkati community of Skutik has one lobster fishing vessel. Its purpose is to fish for food for the three communities, though its crew are permitted to sell part of the catch to meet expenses. The effect of the DFO decision is to prevent the vessel from fishing in half of LFA 37, traditional Peskotomuhkati waters, except pursuant to a “food-social-ceremonial” licence calculated to meet the needs of only the smallest of the three communities.

The failure of DFO’s consultation and accommodation process with the Peskotomhkati

45. Michael Cherry, a retired DFO employee, was contracted to prepare a report on LFA 37. The Terms of Reference make it clear that the “purpose” of the report was to outline a path to the division by DFO of LFA 37 between the Grand Manan and Fundy North fishermen’s associations.

> The purpose of this document is to outline the Department of Fisheries and Oceans (DFO) Maritimes Region, decision-making framework for the division of the currently shared Lobster Fishing Area (LFA) 37, and subsequent reallocation to LFA 36 and 38 creating two neighbouring but fully independent fishing areas.

46. The terms of reference indicate that it is DFO, and not Michael Cherry, that bears the duty to consult with “Indigenous groups.”

> DFO has a legal duty to consult with, and in some circumstances accommodate the interests of Indigenous groups where DFO has knowledge of the potential existence of Aboriginal or treaty rights and is making decisions that may adversely affect or infringe on such rights.
> The results of such consultation will be considered in the decision-making process for the division of LFA 37…
> DFO will continue to consult and engage with Indigenous and stakeholder groups for the purpose of clarifying and gaining contextual understanding of available information.

47. Michael Cherry met with John Ames, the Managing Director of the Passamaquoddy Recognition Group Inc., and Harry Sappier, the fisheries co-ordinator for the Peskotomuhkati Nation at Skutik. He met with them by Zoom, by computer, because a face-to-face meeting was not possible during the COVID pandemic. Each meeting lasted about an hour. He had no communication with Paul Williams, the Peskotomuhkati consultation co-ordinator. He did not provide John Ames or Harry Sappier with a copy of the terms of reference for his work. With respect to Peskotomuhkati views and concerns, Michael Cherry reported:

> The Peskotomuhkati Nation at places a high importance on the conservation and sustainability of lobster stocks. They currently do not have a commercial lobster fishery and have limited food social and ceremonial access. The Peskotomuhkati Nation at Skutik have suggested that consideration be given to a portion or all of LFA 37 that could be reserved as an Indigenous Protected and Conserved Area (IPCA). A recovery area for lobster would benefit the species and harvesters in the long term.

48. Possibly because his terms of reference only directed him to come up with recommendations for a division of LFA 37 between the Grand Manan and Fundy North fishemen's associations, Michael Cherry made no further mention in his report of the Peskotomuhkati proposal for an Indigenous Protected and Conserved Area in LFA 37.

49. However, Michael Cherry's report did make a recommendation concerning Peskotomuhkati rights:

> Further, the Peskotomuhkati Nation is in the early stages of recognition with respect to Aboriginal and treaty rights and any decision on LFA 37 should consider the long-term negotiations with the Peskotomuhkati community on fisheries access for FSC and moderate livelihood fisheries, including the fact that they are a trans-boundy [sic] community.

50. Michael Cherry's report indicates no contact with the Peskotomuhkati communities of Sipayik and Motahkamikuk.

51. "Recognition" of Peskotomuhkati treaty fishing rights is not "in the early stages." The treaty rights exist, and are binding upon the Crown. They are not dependent on "recognition." Michael Cherry confused the issues of Aboriginal and treaty rights with a distinct process: the Peskotomuhkati in Canada were omitted from recognition pursuant to Canada's *Indian Act*. Negotiations toward that recognition, which is independent of Aboriginal and treaty rights, have been ongoing since 2007.

52. The terms of reference for Michael Cherry's work confirm that DFO's decision to divide LFA 37 between the Grand Manan Fundy North fishermen's associations had already been set, before any "consultations." The report was commissioned only to assist in drawing the line.

> DFO is committed to dividing LFA 37 in a manner that, in its view, provides equitable distribution of LFA 37 between LFA 36 and LFA 38 based on assessment of the available information.

53. In the terms of reference for Michael Cherry's report, the criteria to be considered in the division of LFA 37 between the two associations of non-Indigenous fishermen do not take Peskotomuhkati treaty or Aboriginal rights into account: the criteria are:

> The division of LFA 37 shall be implemented in a manner that supports the orderly management and control of the fishery, including but not limited to:
> - Elimination or mitigation of the potential for conflict,
> - Safe accessing to fisheries resources,
> - Support for biodiversity and ecosystem management principles, and
> - The ongoing sustainability of the Lobster stocks in accordance with Section 6.1(1) of the *Fisheries Act.*

54. The May 8, 2024 "consultation" letter shows that DFO's main concern is "safety" and "disorderly conduct" between non-Peskotomuhkati (both non-Indigenous and Wolastoqey) commercial fishers in LFA 37, including their "race for first access" to the lobsters. The letter does not address Peskotomuhkati concerns about access to the fishery for Peskotomuhkati fishers from the Maine communities; Peskotomuhkati concerns about overfishing; or Peskotomuhkati concerns about the purported allocation of Aboriginal and treaty rights to Wolastoqey fishers.

55. There is no indication that in making its 2022 and 2023 decisions on dividing LFA 37 between the Grand Manan and Fundy North fishermen's associations, the Peskotomuhkati recommendation to LFA 37 apart as a protected and conserved area was ever seriously considered by DFO. However, the May 8, 2024 letter states that "the contemplated changes to the boundaries of LFA 36 and 38 which would remove LFA 37 in the regulation are on hold to allow for further consultation with rights holders." The letter does not identify who the rights holders are. It states that "this hold is intended to enable DFO and rights holders to commence talks on what the concept of an IPCA [Indigenous Protected or Conserved Area] includes and where an IPCA may be best suited. The DFO Maritimes Region Marine Planning and Conservation Section will be leading discussions on PICAs and their application." Those discussions were brief and "high-level," about the concept of setting aside protected areas, and did not address LFA 37 at all.

56. The Supreme Court of Canada explained in *Mikisew Cree First Nation v. Canada (Minister of Heritage)* in 2005:

> Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.

Conservation

57. DFO has reduced its ability to monitor the viability of lobster stocks in LFA 36, 37 and 38, both by a deep reduction in scientific staff between 2005 and 2015, and by moving lobster experts in southern New Brunswick into other positions, replacing them with staff with less expertise and time.

58. The Peskotomuhkati priority in fisheries has always been conservation and restoration. The 2019 policy paper, *Samaqan,* states: "We view the rivers, the Bay and the ocean as living beings, requiring our respect and protection. Before we consider our human needs, we will gain a fuller insight into the present state of the

waters and the entire ecosystem…our goal is to restore the health of the ecosystems within Peskotomuhkatikuk and, by extension, all the species living within those ecosystems."

59. An overview of DFO management of the lobster stocks of the three LFA's lead to the conclusion that the Department has consistently prioritized the interests of the industry over those of either the lobsters or Indigenous treaty rights holders. This is the reverse of its legislative mandate as well as its public positions.

60. Anecdotal evidence indicates that the lobster stocks are in trouble. Increasing the efficiency of the industry is a step in the wrong direction.

The Grand Manan Fishermen's Association in Federal Court

61. In October, 2022, the Grand Manan Fishermen's Association (GMFA) went to court against the DFO and the Fundy North Fishermen's Association. The application (*Grand Manan Fishermens Association v. Canada (Attorney General)* 2023 FC 1418) was to prevent the geographic division of LFA 37. The GMFA asserted that the Minister of Fisheries and Oceans had acknowledged that consultation with Indigenous communities is incomplete.

62. The court's decision was issued on October 25, 2023. The court concluded that the GMFA lacked standing to argue that the DFO had failed in its duty of adequate consultation with Indigenous peoples. GMFA's role "does not include a mandate to speak for First Nations' interests in a s. 35 sense." The Peskotomuhkarti were not notified by their treaty partner the Crown that their rights were being litigated.

Peskotomuhkati communications to DFO

63. Pestotomuhkati communications to DFO were sent to Regional Director General Doug Wentzell, the official who ultimately made the decision about whether and how to divide LFA 37 between the Grand Manan and Fundy North fishermen's associations.

64. There have been regular telephone conversations between the Peskotomuhkati and DFO, with Doug Wentzell leading the conversation on the DFO side, and Sakom Hugh Akagi doing so on the Peskotomuhkati side. The proposed division of LFA 37 between the Grand Manan and Fundy North fishermen's association, and the exclusion of Peskotomuhkati treaty commercial fishers, were a topic of the conversations during 2022 and 2023.

65. On June 9, 2023, the deadline set by DFO for Indigenous input, Paul Williams sent a 46-page report on the proposed division of LFA 37 to Doug Wentzell and three other DFO employees. His covering e-mail summarized the report:

> I am attaching the Peskotomuhkati communication on the proposed division of LFA 37 between the licence holders of LFAs 36 and 38.
>
> We disagree strongly with that proposal.
>
> To summarize what we're saying, we'd like LFA 37 set apart for two purposes. First, as a marine protected area, because the lobster populations, and other species, require protection. Second, to make room for an eventual Peskotomuhkati treaty commercial fishery.
>
> The Wabanaki experience over the past two and a half centuries and especially over the last thirty years is that, where fisheries are allocated to "the industry," it is difficult and dangerous to make room for Wabanaki fishing rights holders. Splitting LFA 37 between the Fund North and Grand Manan fishing associations, on the "safety" grounds that these two industry groups might otherwise engage in violent conduct, would almost guarantee that they would make no room for a Peskotomuhkati fishery.
>
> DFO's "consultation" has been aimed at possible impacts on the Peskotomuhkati food fishery. It does not seem to have taken the treaty commercial fishery into account. It has not taken the impact of the Supreme Court of Canada's decision

> in the Desautel case into account. And, by giving priority to the demands of the commercial industry, it fails to put conservation first.
>
> You have recognized, in our conversations, that the Peskotomuhkati are “rights holders” where the commercial industry are “stake holders.” The missing word in the conversations has been “accommodation,” which is not the same as “consultation.” Treaty rights are established rights, not merely asserted ones. And as the Supreme Court of Canada said in the Tsilhqot’in decision, sometimes accommodation means that a proposal will not go ahead.

66. On June 12, 2023, Paul Williams, lead negotiator for the Peskotomuhkati, wrote to Doug Wentzell. He wrote:

> I am concerned that you are about to make a decision concerning Lobster Fishing Area 37 that will follow in the footsteps of some very bad examples. In our last telephone conversation, you said that you would be making a decision around mid-June about the DFO’s proposal to draw a line across that area and split the lobster fishery between two fishermen’s associations. We got our written response to you and Jeff Dionne by the deadline you had set, June 9.
>
> If you split LFA 37 between the two fishermen’s associations, you will be putting further pressure on the lobster stocks at a time when they are increasingly at risk. You will also be creating a situation in which there will be no room for planning and implementing the Peskotomuhkati treaty commercial lobster fishery. If your department’s primary concern in dividing the area between the two industry groups is “safety,” you need to consider that the least safe fishers in the Maritimes are Indigenous treaty commercial lobster fishers.
> Please do not make this decision without serious, detailed discussion with us, and a full response to our concerns.

67. On August 3, 2023 Paul Williams wrote to Doug Wentzell. Doug Wentzell had recommended, in an August 2 letter, that “[we should] continue to explore opportunities for increased participation in a Peskotomuhkati treaty fishery at the main table negotiations.” Williams pointed out that (1) there is no longer a designated federal fisheries negotiator at the main table, (2) at that table, Canada consistently refused to discuss the substance of Peskotomuhkati treaty rights; (3) Canada has refused to discuss the implementation of the *Desautel* decision, and (4) Canada’s “mandate” at the main table extends only to the Peskotomuhkati community in Canada and excludes the other two communities.

68. In the August 3, 2023 letter, Paul Williams objected to the division of LFA 37 between the two non-Indigenous fishermen's associations.

> Do you honestly think that once LFA 37 is divided between these two associations, they will welcome the advent of a Peskotomuhkati treaty-based commercial fishery? We don't. Based on experiences all over the Maritimes, we fear the result of the allocation of lobster access in this area to Peskotomuhkati commercial fishers will be a new risk of violence… Once the allocation of LFA 37 through the "interim boundary" has been made, it is unlikely that the two associations will tolerate new Peskotomuhkati access. Without the boundary, there can be room for Peskotomuhkati allocation, since it will not be placed in waters claimed by either association.

69. In the August 23, 2023 letter, Paul Williams cited the 2018 *Tsleil Wahtuth* decision and explained that "where a treaty fishery is concerned, the Crown's obligations go beyond mere consultation: they become *accommodation.*" He asked Doug Wentzell to set out the steps that DFO intended to take to fulfill those obligations. Doug Wentzell did not reply setting out those steps.

70. DFO did not reply to the substance of any of these reports or letters. Its reply consisted of the notice that DFO had proceeded to divide LFA 37 between the Grand Manan and the Fundy North fishermen's associations. In 2024, rather than consider the rights of Peskotomuhkati fishers from the Maine communities, their right to priority of allocation, or the conservation concerns of the Peskotomuhkati concerning lobster stocks, or addressing its treatment of Wolastqoey commercial fishers as "rights holders" in Peskotomuhkati waters, or implementing an Indigenous marine protected area, DFO has continued to divide LFA 37 between existing non-Peskotomuhkati industrial lobster fishers.

Crown conduct in consultation and accommodation

71. The principles governing the process of consultation began to be described in *Haida Nation v. British Columbia* in 2004 and have been the subject of clarification and detailed description by Canadian courts in the nearly twenty years since then.

72. In *Tsleil Waautooth ,* (2018) FCA 153, the Federal Court of Appeal wrote:

> [558] Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue. Canada's ability to do so was constrained by the manner in which its representatives on the Crown consultation team implemented their mandate. For the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision makers.
>
> [563] The Indigenous applicants were entitled to a dialogue that demonstrated that Canada not only heard but also gave serious consideration to the specific and real concerns the Indigenous applicants put to Canada, gave serious consideration to proposed accommodation measures. And explained how the concerns of the Indigenous applicants impacted Canada's decision to approve the Project.
>
> [564] As a matter of well-established law, meaningful dialogue is a prerequisite for reasonable consultation… Meaningful consultation is not simply a process of exchanging information. Where, as in this case, deep consultation is required, a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation. The Crown must be prepared to make changes to its proposed actions based on information and insight gained through consultation.

73. DFO insists that its decision to divide LFA 37 between two non-Indigenous fishermen's associations is "interim," and therefore without significant impact on Peskotomuhkati rights. It insists that the interim decision will allow it to complete the process of consultation. The Peskotomuhkati experience with DFO "interim" solutions is that they neither lead to any meaningful consultation nor avoid damage to Peskotomuhkati rights. The line across LFA 37 was drawn in 2022 and no meaningful consultation or accommodation has taken place since then.

74. In summary,

    a. DFO's decision to divide LFA 37 between two groups of non-Indigenous fishemens' associations was made before any consultation at all with the Prsktomuhakti;
    b. DFO's decision was made without any dialogue with Peskotomuhkati about the need for reductions in lobster harvests for conservation, and without any

response to the Peskotomuhkati proposal that LFA 37 be declared a marine protected area;

c. DFO's decision was made without any consideration of the priority of allocation in Peskotomuhkati traditional waters for Peskotomuhkati fishermen with treaty rights to fish commercially, and without any conversation with, or consideration for, the rights of the fishermen from the communities of Sipayik and Motahkamiku;
d. DFO's decision placed the economic welfare of non-Indigenous commercial fishermen above the precautionary principle of conservation, or the Aboriginal and treaty rights of the Peskotomuhkati;
e. DFO's refusal to discuss the substance and meaning of the treaty relationship or the content of specific treaty provisions has hampered any meaningful consultation or accommodation;
f. DFO's refusal to implement the Supreme Court of Canada's decision in *Desautel*, and its decision to refuse to discuss the state of Canadian law as part of a process of consultation and accommodation, have further hampered the process;
g. DFO's only response to Peskotomuhkati requests, proposals and objections was to suggest a continuation of a "main table" dialogue that had never taken place;
h. Finally, DFO's failure to even reply to Peskotomuhkati efforts to begin a process of meaningful consultation, and its failure to take Peskotomuhkati proposals into account in its decision-making, constitute a failure of the honour of the Crown, a violation of the treaty relationship, and a violation of the *UN Declaration Act.*

75. Setting aside the division of LFA 37 and prohibiting non-Peskotomuhkati commercial lobster fishing in the area will permit meaningful consultation and accommodation of Peskotomuhkati treaty and Aboriginal rights, avoid increased potential for violence against Peskotomuhkati fishing when it is implemented, and provide a respite for the

lobster populations against the intensity of fishing to the limits of sustainability. In *Haida Nation v. British Columbia,* the Supreme Court of Canada explained:

> [27] To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of that resource. That is not honourable.
>
> [33] …the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

76. In the case of LFA 37, the Peskotomuhkati have received numerous accounts of the dire state of the lobster stocks. That is why they have proposed that the area should become protected for the sake of conservation. As in the case of the Haida forest, by the time the Crown does act to fulfill the terms of the treaties and implement Peskotomuhkati rights, there may not be a viable lobster population left. The precautionary principle, in theory, rules decisions by DFO. In practice, the economic interests of the industry have come first, ahead of both conservation and the Crown's fiduciary and treaty obligations.

Crown conduct prescribed by the *Fisheries Act*

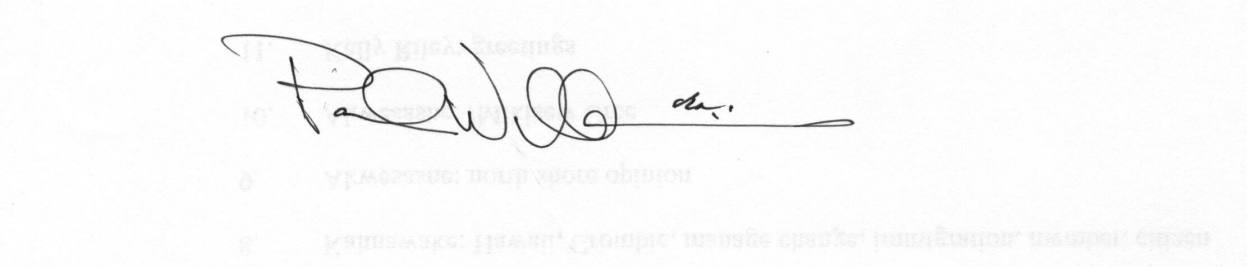
77. Section 2.4 of the *Fisheries Act* provides that:

> When making a decision under this Act, the Minister shall consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by Section 35 of the *Constitution Act, 1982.*

78. This positive obligation is distinct from the duty to consult and accommodate. In the case of LFA 37, though, the Peskotkomuhkati have been careful to delineate the potential and likely adverse effects on their Aboriginal and treaty rights. There is no evidence that in making the decision to divide LFA 37 between two non-Indigenous fishermen's associations, there was any consideration of adverse effects on Peskotomuhkati rights.

79. In the circumstances, DFO's decision to divide LFA 37 between the two groups of non-Indigenous fishermen without a meaningful dialogue with the Peskotomuhkati and without respecting Aboriginal and treaty rights was neither reasonable nor correct.

November 12, 2024



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IN THE FEDERAL COURT OF CANADA

BETWEEN: HUGH AKAGI, WILLIAM NICHOLAS AND AMKUWIPOSOHEHS BASSETT
On behalf of the Peskotomuhkati Nation

Applicants

-and-

HIS MAJESTY THE KING IN RIGHT OF CANADA

Respondent

NOTICE OF APPLICATION FOR JUDICIAL REVIEW