HEILTSUK FIRST NATION

Submission to the Standing Committee on Fisheries and Oceans regarding Bill C-55, amending the *Oceans Act*

November 27, 2017

1. Heiltsuk First Nation ("Heiltsuk") thanks the Committee for the opportunity to address Bill C-55, which amends the *Oceans Act*. Heiltsuk commends the Committee for taking on this important work.

2. This Bill creates increased powers for the new Federal Government to concretely manifest reconciliation with First Nations – a commitment promised in Canada's "Ten Principles" approach – by protecting marine areas and marine resources that are key to First Nations' aboriginal rights. Heiltsuk supports these increased powers, provided they are actually used to designate marine protection areas, specifically nearshore areas that have been prioritized by our marine use plan, and are not merely illusory powers. The former federal government, despite having powers under the *Oceans Act* to create marine protection areas, did not do so in a meaningful and transparent way.

3. Heiltsuk raises three points:

   a. Key marine harvesting areas of First Nations on the coast are fragile areas that are continually subjected to industrial and commercial threats.

   b. First Nations on the coast, like Heiltsuk, are in need of immediate marine protection through Marine Protection Areas, as illustrated by marine use plans prepared by First Nations such as the Heiltsuk Marine Use Plan, the Central Coast First Nations Marine Use Plan (a harmonized plan developed by the four central coast of BC First Nations), and the Marine Planning Partnership for the North Pacific Coast Central Coast Marine Plan (co-developed by First Nations and the province of BC).

   c. As part of reconciliation, Bill C-55 should include measures that may not only accelerate that protection, but provide First Nations on the coast with a role in decision-making and enforcement.

1.0 Heiltsuk First Nation

4. Heiltsuk is a band of Aboriginal peoples located on the Central Coast of British Columbia. Our ancestral homeland comprises a defining portion of what is now known as the Central Coast of British Columbia. It extends from the southern tip of Calvert Island north to Klekane Inlet across from Butedale Inland, from the head of Dean Channel and Inlet to the offshore area west of Goose Island, Aristazabal Island, and Calvert Island, and the intervening inlets, channels, islands and waterways. Our territories include, but are not limited to, 23 reserves.

5. Heiltsuk has traditionally, regularly and continuously used, occupied and exercised jurisdiction over our traditional territories for thousands of years. We have never surrendered our territories or jurisdiction to the Crown through conquest, treaty or other means. Our use and occupation extends to all our marine and terrestrial territories.

6. Traditional harvesting is central to Heiltsuk society. We have relied on marine resources for thousands of years, and our people's health and well-being are inextricably tied to the health and well-being of our land and waters. Heiltsuk depends on natural resources within its territories for food and for health, for traditional activities, for our economy, and for our cultural identity. Traditional harvesting was and remains integral to our distinctive culture.

7. Heiltsuk has traditionally harvested many marine species, including salmon, halibut, ground fish, shellfish (including crabs, prawn, shrimp, clams and oysters), sea urchins, sea cucumbers, herring, herring spawn-on-kelp, eulachon, abalone, and seaweed. Heiltsuk asserts and exercises Aboriginal rights to harvest marine life, based on practices of harvesting for food, social and ceremonial ("FSC") purposes, and for trading purposes. Heiltsuk established an Aboriginal right to harvest herring spawn-on-kelp for both FSC purposes and for trade (i.e., commercial) purposes, in *R. v. Gladstone*, [1996] 2 S.C.R. 723.

8. Fisheries and marine ecosystems are critically important to Heiltsuk, as well as to other First Nations on the coast. Fisheries have been a way of life for Heiltsuk for thousands of years. Archeological data support Heiltsuk fisheries dating back 14,000 years.

2.0 The fragility of traditional harvesting areas

9. First Nations on the coast are disproportionately impacted by the effects of commercial activities on marine ecosystems. These impacts include both accidents from industrial activities that damage ecosystems, as well as commercial fishing that indiscriminately strip traditional harvesting areas of their resources. First Nations feel these impacts keenly. Legally, we assert title and sovereignty to our territories. Culturally, we are duty-bound to steward and protect our territories. Practically, we rely on natural resources that have become strained.

10. The fragility and vulnerability of traditional harvesting areas is illustrated by two simple examples.

11. First, on Oct. 13, 2016, the *Nathan E. Stewart* – part of an articulated tug-barge that included an oil barge, DBL 55 – was travelling from Alaska towards Washington State when it ran aground in the early morning. It sank in a valuable traditional harvesting area – one of Heiltsuk's "breadbasket" areas – where it spilled about 110,000 litres (or about 97 metric tons) of diesel and lubricant oils. Heiltsuk has published an Investigation Report concerning the first 48 hours of the spill. It is available at "*www.nes-investigation.org*".

12. The spill occurred where Heiltsuk harvests much of our marine and land wildlife. For example, Gale Creek and the marine area near Athlone Island, all within the spill area, is a rich ecosystem that Heiltsuk has traditionally harvested using sustainable practices. The Athlone Island and Gale Creek areas were ecologically intact prior to the spill. Gale Creek has traditionally served as one of Heiltsuk's main harvesting sites. It provided Heiltsuk with many food species for FSC and commercial purposes. We harvest at least twenty-five food species from the spill area. The spill closure area, which includes Gale Creek, is the location of the majority of Heiltsuk's manila clam commercial harvest. The affected area is also a significant habitat for an endangered species, the northern abalone. The kelp canopy in the affected area is habitat for sea otters (which is another species protected under the *Species at Risk Act*) and other marine life. That kelp is harvested by Heiltsuk to provide kelp for FSC and commercial spawn-on-kelp (SOK) harvests throughout Heiltsuk territory.

13. Due to the spill, Heiltsuk imposed a harvesting closure to the impacted area, and Canada also closed the area to all bivalve harvesting. A year later, Heiltsuk's closures and the bivalve closures are still in place. Many marine species have been heavily contaminated and may continue to suffer long-term impacts. Heiltsuk's commercial and traditional harvesting may be impacted for many years to come. The true ecological, financial and cultural impact of the spill is currently unknown, as neither Canada nor the province currently obliges the polluter to perform or fund environmental impact assessments.

14. A second example involves Heiltsuk's crab fisheries. Crabs have been part of the traditional diet of the Heiltsuk people for thousands of years. For generations, Heiltsuk managed the resources of their territory, and crabs have been an integral part of the management scheme.

15. In recent years, Heiltsuk fishers have had to concentrate their crab fishing to locations closer to our community, such as Troup Passage. It is economically challenging to travel to more remote locations due to high unemployment and high fuel prices. But closer areas have been facing pressures from commercial and recreational fisheries. In the last several decades, and especially in the last few years, the availability of crab has declined dramatically. For example, in Troup Passage, Heiltsuk fishermen may catch a small fraction – certainly under one-quarter, and often as low as five to fifteen percent – of what they caught in decades past. Many traditional harvesting areas that have been fished by commercial vessels, which can run about 200 traps at a time, are simply stripped of crabs. Less crab means less food for the community.

16. This second example – one of many other possible examples – shows how industrial and commercial activities have been and are still decimating marine resources that have been a part of Heiltsuk life for thousands of years.

17. Notably, in 2008, four central coast First Nations, including Heiltsuk, advised Canada that we had been unable to secure adequate crab resources to meet our basic food, social and ceremonial requirements. Since that time, it has been challenging to gain DFO's support in closing areas to commercial and recreational fishing. For example, it took repeated meetings and eventual discussion about litigation before DFO agreed to close Troup Passage in late 2016. There are still outstanding crab closures that Heiltsuk has put forth that DFO has yet to honour, though we have been requesting them for about *nine years*. Respectfully, the time has come for the federal government to deploy a different set of tools, such as MPAs, if it wishes to safeguard its marine resources.

3.0 The immediate need for more Marine Protection Areas

18. At present, one Marine Protected Area is in proximity to Heiltsuk. That is the Hecate Strait and Queen Charlotte Island Sponge Reefs MPA, designated in February 2017.

19. While Heiltsuk supports this MPA, Heiltsuk suggests a pressing need for many other MPAs, particularly in nearshore areas, whether they occur individually, or instead through a single MPA with different zones. For this reason, Heiltsuk supports amendments that may expedite Canada moving forward to consider and designate additional MPAs.

20. Much work has already been conducted in regards to designated areas for protection. Heiltsuk has developed its own Marine Use Plan, which includes a marine spatial planning component.

21. The Heiltsuk Marine Use Plan was harmonized with the plans of three other central coast First Nations to create the Central Coast First Nations Marine Use Plan. Stakeholders, including commercial fishers, recreational fishers, townships, and forestry companies were consulted during its creation.

22. Seventeen member First Nations and British Columbia have developed marine use plans for the north and central coast of British Columbia. These plans are available on the Internet at *mappocean.org*. The traditional marine territories of Heiltsuk and four other First Nations are covered by the Central Coast Marine Plan (the "Plan"). The Plan was published in 2015:

http://mappocean.org/wp-content/uploads/2015/08/MarinePlan_CentralCoast_10082015.pdf

The Plan designates various zones, including a Protection Management Zone, for conservation purposes or objectives, that covers 17.53 percent of the Plan Area. The specific breakdown of the areas that make up the Protection Management Zone are set out throughout the Plan.

23. What has been missing, to date, since the Harper government, has been any federal participation in giving effect to these Protection Management Zones, though we

anticipate this will change with the development of the MPA Network of the Northern Shelf Bioregion.

24. Heiltsuk looks forward to a process of reconciliation that includes self-government for First Nations, which will include co-management of marine and other resources. Until such changes occur, however, Heiltsuk looks forward to the new Federal Government moving forward to apply the *Oceans Act* to protect marine resources.

25. In this context, Heiltsuk has the following recommendations on how Bill C-55 might be improved.

4.0 Ways to improve Bill C-55

4.1. Affirming Indigenous jurisdiction

26. Heiltsuk has stewarded its marine resources for thousands of years. Heiltsuk has never ceded jurisdiction over its marine territories. For this reason, Heiltsuk recommends that the power of the Governor in Council to make regulations that designate Marine Protected Areas be exercised only with the consent of directly impacted First Nations. This may be implemented in section 35(3):

> [35] (3) The Governor in Council, on the recommendation of the Minister, and with the consent of the Indigenous communities whose traditional territories will be impacted, may make regulations....

27. Heiltsuk further supports the recommendation by West Coast Environmental Law ("WCEL") that the *Oceans Act* expressly does not derogate from the inherent jurisdiction of Indigenous peoples over their marine territories. For ease of reference, WCEL's proposed language is as follows:

> 2.2 Nothing in this Act abrogates or derogates from pre-existing jurisdiction of indigenous peoples over indigenous marine territories, which is hereby recognized and affirmed.

4.2. Include traditional harvesting an express basis for MPAs

28. Section 35(1) of the *Oceans Act* currently sets out five broad grounds on which Canada may create a Marine Protected Area. Given constitutionally-protected aboriginal rights, the special position of First Nations should be an express basis of protection under section 35(1). Accordingly, Heiltsuk suggests that s. 35(1) be amended as follows:

> 35(1) A marine protected area is an area of the sea that forms part of the internal waters of Canada, the territorial sea of Canada or the exclusive economic zone of Canada and has been designated under this section or section 35.1 for special protection for one or more of the following reasons:
>
> > (a) the conservation and protection of Indigenous fishery resources, including marine mammals, and their habitats;

> (a.1) the conservation and protection of commercial and non-commercial fishery resources, including marine mammals, and their habitats;
>
> …

Such an amendment would make clear that MPAs may be designated in order to protect areas that are key to aboriginal rights.

4.3. Provide for regulations to ensure a meaningful and transparent process

29. Section 35(3) currently authorizes the Governor in Council to make regulations, but the provision – including the proposed amended provision – does not provide for regulations relating to the process by which government may consider and exercise its powers to create MPAs, or to decide on their content.

30. Unfortunately, the process by which the government may decide to exercise its powers under the *Oceans Act* is far from transparent, and does not express the government-to-government approach the federal government has espoused for dealing with First Nations, as part of its "Principles respecting the Government of Canada's relationship with Indigenous peoples".

31. For example, despite fisheries co-management being a key subject for government-to-government discussions between Canada and First Nations on the coast, the *Oceans Act* does not mandate consultation with or consent of First Nations, or expressly provide First Nations a role in how government may consider and investigate proposed MPAs, designate areas as MPAs, distinguish between zones within an MPA, or address classes of activities. This was most recently illustrated by how the federal government designated the Hecate Strait and Queen Charlotte Island Sponge Reefs MPA without engaging in consultation with Heiltsuk, or making Heiltsuk part of the decision-making process.

32. As a starting point, Heiltsuk recommends that the *Oceans Act* create an express power of the Governor in Council to make regulations that may govern the processes by which government may exercise its MPA-related powers under the *Oceans Act*. Accordingly, the amendment to s.35(3) might instead read as follows:

> 35(3) The Governor in Council, on the recommendation of the Minister, may make regulations
>
> (a) designating marine protected areas; ~~and~~
>
> (b) delineating zones within marine protected areas;
>
> (c) prohibiting classes of activities within marine protected areas; ~~and~~
>
> (d) respecting any other matter consistent with the purpose of the designation; and

(e) governing the processes by which the Minister may formulate recommendations to the Governor in Council, in consultation and with the consent of the Indigenous communities whose traditional territories will be impacted, including regulations

(i) governing how the Minister receives and assesses information relating to potential and other marine protection areas;

(ii) governing how the Minister discloses information relating to potential and other marine protection areas, to Indigenous communities and to the public;

(iii) giving effect to co-management agreements between the federal government and Indigenous communities, governing decision-making about marine protection areas;

(iv) governing how the Minister may establish advisory or other tribunals to investigate, assess and make recommendations about potential and designated marine protection areas; and

(v) requiring that government consult with and obtain consent of coastal Indigenous communities in relation to designating or altering potential or other marine protection areas.

33. Regulations of the nature described above would allow Canada to move another step closer to giving effect to its commitments under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 18 of UNDRIP states that, "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves..."

4.4. Minimum MPA content

34. Heiltsuk supports the recommendation by WCEL that MPAs include specific minimum content. For ease of reference, WCEL has suggested the addition of a new section 35.1:

35.1 Prohibitions

No persons shall explore for or exploit hydrocarbons, wind or tidal power, minerals, aggregates or any other inorganic matter, conduct marine finfish aquaculture, or use bottom trawl fishing gear within a marine protected area.

Heiltsuk supports the addition of such minimum restrictions.

35. WCEL has also suggested further specific minimum content, in the form of a "no take" requirement that limits commercial and recreational extraction (within a

minimum of 75% of an MPA). For ease of reference, WCEL has suggested the addition of a new section 35.2:

> **35.2 Prohibition on Extractive Activities in at least 75 per cent of Area**
>
> (1) Each marine protected area must prohibit all extractive and commercial activities, including commercial and recreational fisheries in at least 75 percent of the area to fully protect the specific features or sensitive elements of the marine ecosystems.
>
> (2) Nothing in this provision limits the constitutionally protected rights of Indigenous peoples.

Heiltsuk supports the idea that MPAs should operate automatically, or at least presumptively, to limit commercial and recreational fisheries. As illustrated above, the ability of Heiltsuk to engage in their traditional harvesting is being impaired by overfishing, due to commercial and recreational fisheries.

36. An automatic, or at least presumptive, limit on commercial and recreational fisheries, would make clear that an MPA is a real tool to conserve fisheries in inland waters. Given the current pressures on fisheries, ad hoc management by the federal government has proven completely ineffective.

4.5. The inclusion of specific priorities

37. WCEL has recommended that the *Oceans Act* include an express statement that the priority of government be to maintain or restore ecological integrity, through the protection of natural resources and natural processes. WCEL has suggested such a statement as a new section 35.3.

38. Heiltsuk supports this recommendation, and further suggests an express statement that the *second* priority of government be to protect fisheries over which First Nations exercise aboriginal rights, including their rights to fish for food, social and ceremonial purposes.

39. For purposes of guiding how and why the government may designate MPAs, an express reference to aboriginal rights would concretely affirm the principle established by the Supreme Court of Canada in ***Regina v. Sparrow***, [1990] 1 S.C.R. 1075, that "any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing." First Nations are not mere "stakeholders" that form a part of the general public.

4.6. Assign IUCN Protected Area Categories

40. Heiltsuk supports WCEL's recommendation that the *Oceans Act* require the use of IUCN Protected Area Categories, as set out in its proposed new section 35.4. This would be consistent with the use of these categories in the marine use plans developed by First Nations on the coast as part of MaPP.

4.7. Expressly allow for Indigenous enforcement officers

41. Proposed section 39(1) of the *Oceans Act* will permit the Minister to designate "persons or classes of persons as enforcement officers for the purposes of the administration and enforcement of this Act and the regulations."

42. Like other First Nations, Heiltsuk carries on a Coastal Guardian Watchmen Network through which it monitors the waters and the resources within its traditional territory. Respectfully, the time has come not only for a more extensive use of MPAs to protect resources, but for Canada to expressly recognize the role that First Nations may play in stewarding our waters. Heiltsuk recommends a new section 39(1.1) as follows:

> (1.1) Without limiting subsection (1), the Minister may designate any Indigenous organization as an enforcement officer for the purposes of the administration and enforcement of this Act and the regulations.

4.8. Allow for private prosecutions, or civil enforcement by Indigenous organizations

43. Heiltsuk applauds the new ranges of fines in Bill C-55. These fines are, however, all dependent on prosecutions by Canada. As part of a larger role for First Nations in marine management and enforcement, Heiltsuk recommends that First Nations on the coast be allowed to engage in "private" prosecutions of persons and ships that violate MPA restrictions, or alternatively, have a right to bring a civil action against violators, with a right to seek civil liability for sums comparable to the fines proposed sections 39.6.

44. Civil fines could then be paid into local or regional environmental funds to pay for past and future enforcement proceedings and other activities by Indigenous organizations, conservation activities such as impact assessments and restoration projects, and research into the baseline conditions of various marine conservation areas.

45. Indigenous rights of enforcement, combined with funding by polluters and other violators, would allow for vigorous enforcement by the very people – the Indigenous communities that live on the coast – who are most interested in protecting marine resources.

46. Such measures could be added through a provision that allows for classes of persons specified by regulation, including Indigenous organizations on the coast, to bring civil proceedings against persons who contravene the *Oceans Act* or regulations; a provision that a civil court may order payments in amounts equal or comparable to the proposed fines; and regulations, made in consultation with First Nations, that would govern how civil fines might be paid into local or regional environmental funds to finance enforcement, conservation and environmental research activities.

5.0 The Promise of the Future

47. Heiltsuk welcomes developing a true Nation-to-Nation relationship with Canada. The past Federal Government led by Harper was deaf to the rights and interests of Indigenous Peoples. This Bill is a step towards the *Oceans Act* forming part of a family of marine legislation that will protect marine resources in fact, and not merely in theory.

Respectfully,

HEILTSUK FIRST NATION

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